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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE PEMBEK OIL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case insofar as it denied enforcement to part of the Board's remedial order.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–19a) is reported at 404 F. 2d 105. The decision and order of the Board (App. C, *infra*, pp. 29a–79a), are reported at 165 NLRB No. 51.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 20a–26a), was entered on December 19, 1968.

The Board's timely petition for rehearing *en banc* was denied on January 16, 1969 (App. B, *infra*, pp. 27a–28a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly concluded that an order directing an employer to bargain with the union selected by a majority of its employees was an inappropriate remedy although the court acknowledged that there was an unlawful refusal to bargain and other unfair labor practices that had dissipated the union's support.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 8(a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

SEC. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative

action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

STATEMENT

The court of appeals, on review, accepted the Board's view of the factual setting of this case. It also sustained the Board's unfair labor practice findings. It disagreed, however, regarding the appropriate remedy, and this question of remedy is the sole subject of this petition. It is important, however, to state in some detail the findings which set the context for the Board's remedial determination.

A. THE FACTUAL SETTING

Pembek Oil Corporation sells fuel oil and installs and services oil burners (App. C, *infra*, p. 33a). For some time prior to August 1966, the Company's non-clerical employees had been dissatisfied with their working conditions. Accordingly, when Carl Collins, a known union member, was hired that month, his fellow workers asked him to put them in touch with a union representative (App. C, *infra*, pp. 38a–39a, 44a; Tr. 160, 245–246).[1] Collins phoned James Galullo, Business Agent of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 677; Galullo provided literature and authorization cards which Collins distributed (App. C, *infra*, p. 39a; Tr. 163–165).

[1] "Tr." refers to the transcript of the testimony at the Board hearing; "G.C. Exh." and "R. Exh." refer to the exhibits introduced at the hearing.

By September 8, nine of the 15 non-clerical employees had signed union authorization cards (App. C, *infra*, p. 39a);[2] the next day, the Union wrote the Company (App. C, *infra*, pp. 39a–40a; G.C. Exh. 2):

> Teamsters Local Union No. 677, hereby notifies you that a majority of your truck drivers, oil burner servicemen and installers, mechanics, and helpers have authorized our Union to act as their collective bargaining representative for the purpose of negotiating a labor contract covering their wages, rates of pay, hours of work, and other working conditions.
>
> I suggest that the first negotiating session be held during the week beginning Sunday, September 11, 1966, at a time which is convenient.

When Pembek's President, Fred Knell, received the Union's letter, he retained an attorney (Tr. 385–386), and the next day the attorney wrote the Union (App. C, *infra*, pp. 40a–41a; Tr. 386, G.C. Exh. 6):

> * * * The Pembek Oil Corporation disputes your claim that a majority of the truck drivers, oil burner servicemen and installers, mechanics, and helpers employed by that Company have authorized you to act as their bargaining representative.
>
> In addition, the Pembek Oil Corporation disputes the appropriateness of the unit.
>
> The Pembek Oil Corporation will recognize you only if you are certified as the bargaining agent as a result of an election conducted by the National Labor Relations Board. The

[2] In relevant part, each card stated that the signer authorized the Union "to represent me for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment" (App. C, *infra*, p. 42a).

> Company has received a copy of a petition filed by you with the Board, known as Case No. 1-RC-9178. [3]
>
> It is the Company's opinion and position that any cards signed by any of its employees were cards signed solely for the purpose of obtaining a representation election conducted by the National Labor Relations Board and, if not for that purpose, were signed based upon misrepresentations by representatives of your Union as to the import of these cards.

Several hours after the Company received the Union's letter, union activist Collins was discharged, ostensibly because he had "made too many mistakes in computing the price of fuel oil" (App. C, *infra*, p. 44a; Tr. 175, 421–422). The following evening, Collins and about nine other employees met with Union Representative Galullo at the Union headquarters (App. C, *infra*, p. 48a; Tr. 101–102, 113). They discussed the discharge and submitted a series of proposals regarding conditions of employment which they wanted the Union to discuss with the Company; a tenth employee submitted a signed authorization card at that time (App. C, *infra*, pp. 48a–49a, 41a; Tr. 102–105, 114–117, 164–165). Galullo outlined measures which might be taken, including a strike, to procure Collins' reinstatement and a contract (App. C, *infra*, pp. 48a–49a; Tr. 103–105). The employees decided to go on strike the next day for those purposes (App. C, *infra*, p. 49a; Tr. 150, 240–241, 322–324).

[3] The Union had filed a representation petition with the Board on September 12; it was later withdrawn (App. C, *infra*, p. 40a; Tr. 101).

On September 14, most of the employees who had attended the previous night's meeting picketed the Company's premises App. C, *infra*, p. 49a; Tr. 121, 307–309). Union and Company representatives met with Federal and State mediators, but the Company again rejected the Union's request for recognition, asserting that the unit was inappropriate (App. C, *infra*, p. 41a; 144–147, 425). Early the next morning, the strikers decided to return to work, apparently because two of the Company's servicemen, members of another union, did not honor the picket line (App. C, *infra*, p. 49a; Tr. 220–221, 234–235, 324). Employee Carlson telephoned Pembek's Secretary, John Grant, to ask whether they "could come in and sit down and talk," and Grant agreed to a meeting between the employees and President Knell, a supervisory employee and Grant (App. C, *infra*, p. 49a; Tr. 221–222, 235, 427–428).

At the meeting, Carlson explained that the employees were there to discuss their "gripes." Knell said that he "had no idea things had gotten as bad as they were," that maybe "this was a good thing that it did come out," and that "we could straighten something out by having this get together" (App. C, *infra*, p. 50a; Tr. 222–223, 271, 428). The employees asked for a pension plan, and for a posted pay scale. In addition, they spoke of sick and holiday pay (App. C, *infra*, p. 50a; Tr. 271–272, 429). The Company representatives indicated that they had already made inquiries of several insurance companies about pensions; Grant added that sick pay benefits would not be

granted where absence from employment was due to sickness of a member of the employee's family. (App. C, *infra*, p. 49a; Tr. 272, 429.) The parties agreed to meet again during the following week, and the employees retired to "the back shop" to prepare proposals (App. C, *infra*, p. 51a; Tr. 223–224, 273, 439).

Before the meeting had started, Knell had tried to telephone the Company's attorney for advice as to what the Company ought to do under the circumstances (App. C, *infra*, p. 50a; Tr. 389). Counsel, away at the time, returned the call while the employees were working on prospective proposals in the back shop. He forbade further meetings with the employees because, as Knell put it, "having signed the cards, they are considered members of the Union, and until this thing is settled one way or the other, you cannot bargain with them no how." (App. C, *infra*, p. 51a; Tr. 389–390.) Grant and Knell immediately told the employees that upon the advice of counsel they would not meet with them again. The employees pressed for the reason and Grant explained that the Company's attorney "has informed us that you have signed cards, and you are automatically represented by the Union," and added that they were now Union members (App. C, *infra*, p. 51a; Tr. 429, 225, 389–390).

Later that day, the employees decided that they no longer wanted the Union to represent them (App. C, *infra*, p. 51a; Tr. 227–229). Employee Emery phoned Union Agent Galullo and told him that the workers "wanted out," and "didn't want anything to do with

the Teamsters Union because they believed they were misled into it" and "didn't want it to represent" them (App. C, *infra*, p. 51a; Tr. 269, 122–123). The employees, except Collins, then engaged a lawyer. On October 10, the employees' lawyer sent the Union formal notices, dated October 5 and signed by each employee except Collins, advising that the employees were rescinding the authorization previously given the Union to represent them (App. C, *infra*, pp. 51a–52a; Tr. 134–136, 233, R. Exh. 7a–j).

B. THE UNFAIR LABOR PRACTICE FINDINGS

In this context, the Board made the following findings, all of which were sustained by the court of appeals: The Company had discharged Collins because of his union activity, in violation of Sections 8(a)(3) and (1) of the Act (App. C, *infra*, pp. 52a–56a). By dealing directly with its employees and leading them to expect that it would improve their conditions of employment but for their union membership, the Company had caused them to repudiate the Union in further violation of Section 8(a)(1) (App. C, *infra*, pp. 59a–60a). Finally, when the Union requested recognition, it possessed valid authorization cards from a majority of employees in an appropriate unit[4]; and, as shown by its Section 8(a)(3) and (1) violations, the Company's refusal to bargain with the Union was not made in good faith because of any doubt about its majority status, and therefore violated the Com-

[4] The Examiner invalidated the card of employee Emery, but this still left the Union with a majority (App. C, *infra*, p. 68a).

pany's obligation to bargain with the Union under Sections 8(a)(5) and (1) (App. C, *infra*, pp. 65a–70a).

C. THE REMEDIAL ORDER

On the basis of the foregoing findings, the Board ordered the Company to cease and desist from the unfair labor practices found; to reinstate Collins with back pay; and to bargain with the Union upon its request (App. C, *infra*, pp. 74a–76a). The court of appeals, sustaining all of the Board's findings, agreed that the remedies ordered for the Section 8(a) (1) and (3) violations were appropriate, and ordered them enforced (App. A, *infra*, pp. 10a–13a). However, a majority, Judge Hays dissenting, refused to enforce the Board's remedy for the Section 8(a)(5) violation. Despite the findings that there was an obligation to bargain which had not been respected and that the repudiation of the Union had been caused by the employer's unfair labor practices, the majority expressed "considerable doubt as to the employees' continued desire to be represented by the Union" (App. A, *infra*, p. 16a). Because of this doubt and its own feeling that "there has been no such display of flagrant hostility as would suggest that a future election would not actually reflect the desires of the employees," (*id.* at 14a), it concluded that "the Board should have permitted the bargaining representative to be determined by an election held within a reasonable time. A bargaining order in this case would be excessively strong medicine for the ailment and unfair not only to the employer but to the employees as well" (*id.* at 16a).

REASONS FOR GRANTING THE WRIT

1. The issue presented in this case is implicit in several cases recently argued and submitted to this Court, *National Labor Relations Board* v. *Gissel Packing Co., Heck's Inc., General Steel Products, Inc., et al.*; *Food Store Employees Union* v. *Gissell Packing Co. et al.*; and *The Sinclair Co.* v. *National Labor Relations Board,* Nos. 573, 691, 585, this Term. In those cases, the issue is primarily whether the Board may find an unlawful refusal to bargain when an employer declines to recognize and deal with a union holding valid authorization cards from a majority of an appropriate unit of its employees, and also engages in substantial unfair labor practices. But if there were indeed violations of Section 8(a)(5) in those cases, this Court will have to consider further whether bargaining orders were appropriate remedies. In two of the submitted cases, *Sinclair* and *General Steel Products,* the remedy issue is very similar to that in the instant case; there, elections held under the cloud of unfair labor practices showed that the unions' strength had been dissipated, and the employers claim that the absence of a union majority—without regard to its cause—makes a bargaining order inappropriate as a remedy.

As shown in our submissions in those cases, this Court has clearly endorsed use of the bargaining order remedy where an employer's unfair labor practices have dissipated a union's majority. Thus, in *Medo Photo Supply Corp* v. *National Labor Relations Board,* 321 U.S. 678, a majority of employees desig-

nated a union as their representative, and the employer agreed to bargain with it. The employees then offered to abandon the union if their wages were raised. The employer agreed to the wage increase, the employees withdrew from the union, and the employer declined to bargain further with the union. On complaint, the Board found that the revocations had not occurred until the irregular negotiations with the employees, and that the subsequent refusal to bargain with the union was therefore unlawful. This Court sustained that conclusion because the employees' withdrawal from the union had been encouraged by the employer's unlawful acts.

Although the propriety of the ensuing bargaining order was not challenged in *Medo*, 321 U.S. at 687–688, that issue was considered in *Franks Bros.* v. *National Labor Relations Board*, 321 U.S. 702, decided the same day. In *Franks Bros.*, this Court made clear that such an order is appropriate if a union's loss of majority following an unlawful refusal to bargain is attributable to the employer's unfair labor practices.

> The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. [321 U.S. at 705.]

Indeed, in such cases a bargaining order is not an unusual remedy, but the only adequate means of redressing the unfair labor practices committed. Nor does such

an order "involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop" (*ibid.*).[5]

It is immaterial that in the pending cases the union's loss of majority was shown by an election whereas here (as in *Medo*) it was shown by notices rescinding the authority previously given the union. The important feature in both cases is the Board's determination—sustained in the present case by the court of appeals—that the loss was attributable to employer unfair labor practices. The situation thus brought about can be fully remedied in either situation only by a bargaining order; for a new election would necessarily reflect the altered employee sentiment, which is attributable, at least in part, to the employer's unfair labor practices. Thus the court of appeals' modification of the remedial order made its affirmance of the Board's findings in this regard substantially nugatory.

This case is one of a number of cases in which the Second Circuit has tended to weigh *de novo* the severity of an employer's unfair labor practices in authorization card cases. In earlier cases that court has reversed the Board's findings of refusal to bargain or has declined to enforce a bargaining order based on Section 8(a)(1) and (3) violations where it was its own

[5] See also *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 748, n. 16; *National Labor Relations Board* v. *Int'l Union, Progressive Mine Workers*, 375 U.S. 396, summarily reversing 319 F. 2d 428 (C.A. 7).

judgment that the unfair labor practices were not flagrant. See, *e.g., National Labor Relations Board* v. *Adhesive Products Corp.*, 281 F. 2d 89, 91–92 (C.A. 2); *National Labor Relations Board* v. *Flomatic Corp.*, 347 F. 2d 74, 77–80 (C.A. 2); *National Labor Relations Board* v. *Better Val-U Stores*, 401 F. 2d 491, 494–496 (C.A. 2). Here, that court affirmed refusal-to-bargain findings but denied the Board's order much of its force by eliminating the bargaining requirement, and did so on the same general basis of reevaluating the employer's culpability.[6] As in the earlier cases, the court of appeals' action stemmed from its view that since a bargaining order based on authorization cards "dispenses with the necessity of an election, there is always the risk that a bargaining representative may be imposed on employees, at least for a time, when they no longer wish it to represent them" (App. A, *infra*, p. 14a).

Thus, the basic justification for the court's interference with the Board's remedial choice in this case is the same doubt regarding the Board's handling of authorization cards which animates the pending *Sinclair* and *Gissel* cases generally. If the Court sustains the Board's findings in those cases, it may accordingly follow that the fundamental basis for the decision below in this case is repudiated. And any decision the Court reaches on the remedial question in *Sinclair* and

[6] The court's evaluation of the factual circumstances of this case is unwarranted: the Company's meeting with the employees, which constituted an unfair labor practice, was not as "innocent" as the court suggests; and the court overlooks the Company's earlier coercive action in discharging Collins, the instigator of the union activity.

General Steel Products will be determinative of—or at least illuminate—the issue in the present case.[7]

2. The decision below is inconsistent with the general principles which this Court has enunciated respecting the scope of the Board's remedial authority. Section 10(c) of the Act empowers the Board to order a person who has engaged in an unfair labor practice "to take such affirmative action * * * as will effectuate the policies of this Act." Under this provision, the Board has power to enter an order which will restore "the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practices]." *Phelps-Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 194. This Court has continually emphasized the breadth of the Board's authority to mold a remedy to fit a particular violation and undo its ill effects.[8] What the Board ordains will not be set aside "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Corp.* v. *National Labor Re-*

[7] If the pending cases were to be decided adversely to the Board, there would, of course, be no occasion for further review here, since here the basic refusal-to-bargain finding was premised upon a union majority as shown by authorization cards.

[8] See *e.g., Fibreboard Corp. v. National Labor Relations Board,* 379 U.S. 203, 216; *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co.,* 308 U.S. 241, 250; *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 361–366; *Virginia Electric Co.* v. *National Labor Relations Board,* 319 U.S. 533, 538–544; *Int'l Ladies' Garment Workers' Union* v. *National Labor Relations Board,* 366 U.S. 731, 735, 736, 739–740; *Franks Bros., supra.*

lations Board, 379 U.S. 203, 216, quoting from *Virginia Electric Co.* v. *National Labor Relations Board,* 319 U.S. 533, 540.

If the refusal-to-bargain violation was properly found in this case, it can hardly be said that the relief ordered by the Board sought to achieve improper ends. As shown, a bargaining order is the usual and perhaps only adequate remedy for such a violation. As in *National Labor Relations Board* v. *Strong,* 393 U.S. 357, and *National Labor Relations Board* v. *The Kroger Co.,* petition for a writ of certiorari pending, No. 1130, this Term, the court's refusal to enforce the Board's remedy despite its agreement as to the unfair labor practices committed is a serious departure from settled principles governing the Board's authority to devise appropriate remedies for unfair labor practices.

CONCLUSION

Because this Court's decisions in the *Sinclair* and *Gissel* cases will undoubtedly affect the questions presented here, we urge that this case be held pending decision in those cases, and that the petition for a writ of certiorari be granted if the Board is upheld in *Sinclair* and *Gissel.* In that event, we suggest that the case would be an appropriate one for summary reversal or for vacation and remand for further consideration. Alternatively, it would be appropriate that the case be

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argued with respect to the appropriate scope of court of appeals review of Board remedial orders.

Respectfully submitted.

ERWIN N. GRISWOLD,
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APRIL 1969.

APPENDIX A

In the United States Court of Appeals
for the Second Circuit

No. 129—September Term, 1968

(Argued October 30, 1968 Decided November 27, 1968)

Docket No. 32120

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE PEMBECK OIL CORPORATION, RESPONDENT

Before LUMBARD, *Chief Judge,* KAUFMAN and HAYS, *Circuit Judges*

Petition by the National Labor Relations Board for enforcement of its order requiring an employer to cease and desist from any further violations of § 8(a)(1) and (5) of the National Labor Relations Act, to reimburse an employee it had discharged in violation of § 8(a)(3) and subsequently offered to rehire for any wages lost as a result of the discrimination against him, to recognize and bargain with the Union, and to post the customary notices. Enforcement granted as to all portions of the order except that requiring direct bargaining, as to which the Board's order is modified.

WILLIAM J. AVRUTIS (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Coun-

sel, Marcel Mallet-Prevost, Assistant General Counsel, Elliot Moore, Attorney), *for Petitioner.*

WILLIAM J. LARKIN, II (Waterbury, Conn.), *for Respondent.*

KAUFMAN, *Circuit Judge.* This case comes before us on petition of the National Labor Relations Board for enforcement of its order against The Pembeck Oil Corporation (hereinafter referred to as the Company).[1] The Trial Examiner found that the Company had violated § 8(a)(1), (3) and (5) of the National Labor Relations Act by 1) refusing to bargain with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677 (hereinafter referred to as the Union), 2) bargaining directly with its employees, 3) causing them to repudiate the Union, and 4) discriminatorily discharging Collins, one of its employees, for union activity. Accordingly, he recommended that the Company be ordered to cease and desist from further violations of § 8(a)(1) and (5), to reimburse Collins for the loss of wages he suffered as a result of the discrimination[2] and to bargain with the Union. The Board adopted the Trial Examiner's findings and recommendations in their entirety. Since we believe, upon review of the record, that there is substantial evidence to support these findings, we grant enforcement of the Board's order, except that, for reasons discussed below, we modify that portion of the order requiring the Company to bargain with the Union.

---

[1] Pembeck is a Connecticut corporation engaged in commerce within the meaning of the Act, and the alleged unfair labor practices occurred in Meriden, Connecticut, its principal place of business, all within the jurisdiction of this court.

[2] Since the Company had voluntarily offered to rehire Collins, there was no need for an order directing his reinstatement.

I

The Company is engaged in the business of selling fuel oil, and installing and servicing oil burners in homes and commercial establishments. In the operation of its business the Company employs servicemen who install, service, and repair industrial and domestic oil burners, truck drivers who deliver fuel oil to its customers, sootmen who clean oil burners and related equipment, and a maintenance man who works in the Company's warehouse keeping the shop clean and taking care of the stock.[3] At the time of the events in question, the Company employed 15 such workmen: eight servicemen, two drivers, four sootmen and one maintenance man. Two of the servicemen performed only domestic work, while the other six were engaged in both industrial and domestic work; additionally, two of these six also installed oil burners in buildings under construction, work which the Trial Examiner found occupied their time for only about six weeks out of a year. During the summer when few oil deliveries were made, the drivers were engaged primarily in assisting the servicemen, a task also performed on rare occasions by the sootmen. All these employees are hourly rated and carry timecards, and, except for the maintenance man, all wear the same uniform. In addition, all are covered by a Company insurance program, have the same vacation and sick privileges, and share the same shop facilities.

Prior to the events in question, no labor organization had represented all of the Company's employees. The two servicemen who install oil burners in buildings under construction were, however, covered by a collective bargaining contract between the Company

[3] In addition, the Company employs several office clerks, but they are not in any way affected by the events here in question.

and Local Union No. 21, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry (hereinafter referred to as the Plumbers Union). This contract applied only when these two employees were actually performing the special work of installing oil burners in buildings under construction. When they were engaged in their usual tasks as servicemen, it was not operative except that it permitted them to participate in a health, welfare, and pension program provided for in the agreement.

The company supervisors are its president, Fred J. Knell, secretary John W. Grant, dispatcher Robert J. Thuotte, and sales engineer Arthur Moskaluk. Knell oversees the entire operation. Moskaluk assigns work to all servicemen, assists them with technical problems, and occasionally directs the work of the sootmen, drivers and maintenance man, although these employees are normally supervised by Thuotte and Grant.

The events giving rise to the unfair labor practices here in question began on August 18, 1966, when the Company hired Carl Collins as a fuel delivery driver. According to Collins' testimony before the Trial Examiner, at the time he was hired he was told about the Company's "job training," in reference to which Thuotte said that Collins would "go out with another man for a while to learn the job and that (the Company) invested approximately a year in a man before he would become efficient like they like their employees to be." During this interview Collins was wearing a union button, and he informed his interviewers that he had been a union member.

Shortly after August 19, when Collins commenced his employment, other employees expressed to him dissatisfaction with their working conditions, and, knowing that he was a union member, requested that he

contact someone to whom they could talk about joining a union. Collins called James Galullo, the Union's Business Agent, who sent authorization cards and literature to the employees and additional authorization cards to Collins. Collins distributed these cards among the employees and also discussed with them, individually and in groups, the benefits they might derive from representation by the Union.

By September 8, nine of the fifteen employees had signed authorization cards.[4] The following day, the Union sent a letter to the Company stating:

> "Teamsters Local Union No. 677, hereby notifies you that a majority of your truck drivers, oil burner servicemen and installers, mechanics, and helpers have authoized our Union to act as their representative for the purpose of negotiating a labor contract covering their wages, rates of pay, hours of work, and other working conditions.
>
> "I suggest that the first negotiating session be held during the week beginning Sunday, September 11, 1966, at a time which is convenient."

Knell received this letter the morning of September 12.[5] According to his testimony, he was taken by surprise and "overwhelmed" by its contents, and he immediately retained an attorney, who replied to the Union the following day, saying:

> "* * * The Pembeck Oil Corporation disputes your claim that a majority of the truck drivers, oil burner servicemen and installers, mechanics, and helpers employed by that Com-

[4] These cards stated: "I hereby authorize the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America to represent me for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *."

[5] On this day the Union filed a representation petition, which was later withdrawn without prejudice.

pany have authorized you to act as their bargaining representative.

"In addition, the Pembeck Oil Corporation disputes the appropriateness of the unit.

"The Pembeck Oil Corporation will recognize you only if you are certified as the bargaining agent as a result of an election conducted by the National Labor Relations Board * * *.

"It is the Company's opinion and position that any cards signed by any of its employees were cards signed solely for the purpose of obtaining a representation election conducted by the National Labor Relations Board and, if not for that purpose, were signed based upon misrepresentations by representatives of your Union as to the import of these cards."

On the same day that the Company received the Union's letter requesting recognition and bargaining, it discharged Collins. At the time, Grant explained to Collins as the reason for his discharge that he had made "too many mistakes in computing the price of fuel oil." And later that day Grant gave Collins a Connecticut Employment Security Division form in which, under the caption "Reason for Unemployment," he had specified "Inability to Figure or Compute Prices." Before the Trial Examiner, both Thuotte and Grant stated that they had made the decision to fire Collins jointly, after conferring together, but they gave somewhat different explanations for the discharge. Thus, Thuotte testified that their decision was based on Collins' errors in computing oil prices and his failure to deliver oil to a customer at the specified time, while Grant added to these reasons Collins' spillage of oil on a customer's cellar floor, delivery of oil to a customer who did not order any, and giving a customer an invoice intended for another.

On the following evening, about 10 of the Company's employees and Collins met with Galullo at the

Union's headquarters, where they discussed Collins' discharge and the Company's refusal to recognize the Union. In addition, the employees submitted to Galullo a list of benefits which they expected the Union to obtain for them through negotiation with the Company. It was decided at this meeting that the employees should strike for the purpose of securing Collins' reinstatement and obtaining a collective bargaining contract.

Accordingly, the next day, September 14, most of the employees who had attended the meeting the previous evening struck and picketed the Company's premises. Early the following morning, however, the employees abandoned the strike, apparently because the two servicemen employed by the Company who were members of the Plumbers Union had not honored their picket line during the previous day. Then one of the employees, Carlson, acting for all the striking employees, telephoned Grant to ask whether they "could come in and sit down and talk." When Grant agreed, the employees went to the Company premises, where they met with Knell, Thuotte, and Grant.

Carlson initiated the discussion by saying that the employees were there to discuss their "gripes," to which Knell replied "that he had no idea things had gotten as bad as they were * * * that this was a good thing that it did come out * * * and that * * * we could straighten something out by having this get together." Among the subjects which the employees then mentioned were the lack of a pension plan, their desire for a posted pay scale, and their concern about sick and holiday pay. No specific proposals were presented by either side, and no agreement was reached, except that they would all meet again during the following week. The employees then withdrew to

the Company's shop to prepare specific proposals to present at the next meeting.

Before the meeting had started, Knell had called the Company's attorney for advice as to what action the Company should take under the circumstances, but he had been unable to reach him. Counsel returned the call while the employees were conferring in the shop, and upon learning of the morning's events, he informed Knell that the Company was not permitted to meet further with the employees since they had signed authorization cards and accordingly were considered members of the Union. Grant and Knell promptly told the employees that, upon the advice of their attorney, they could not meet with them further, explaining that their attorney had informed them "you have signed cards, and you are automatically represented by the Union."

Later the same day, the employees decided that they no longer wished the Union to represent them. Subsequently they engaged an attorney of their own choice who under their instruction, sent formal notices informing the Union that the employees rescinded the authority they had previously given the Union to represent them.

II

Turning first to the alleged violation of § 8(a)(3), the Trial Examiner found, and the Board agreed, that the Company had been motivated by antiunion considerations in discharging Collins. The Company contends rather that it released Collins because of the many serious mistakes he made during the short term of his employment. Even if we view the facts most charitably toward Collins, we must agree that he had displayed no small ineptitude in the relatively short period he was on the job. From the Company's un-

disputed evidence, it appears that Collins made numerous blunders in computing the invoices for the oil he delivered, pumped oil on the cellar floor of one customer, spilled oil on the lawn of another, and failed to make an oil delivery at the scheduled time. Nevertheless, the rule is well established that although ample valid grounds may exist for the discharge of an employee, that discharge will violate § 8(a)(3) if it was in fact motivated, even partially, by the employee's union activity. *N.L.R.B.* v. *Milco, Inc.*, 388 F. 2d 133 (2d Cir. 1968); *N.L.R.B.* v. *D'Armigene, Inc.*, 353 F. 2d 406 (2d Cir. 1965); *N.L.R.B.* v. *Great Eastern Color Lithographic Corp.*, 309 F. 2d 352 (2d Cir. 1962), cert. denied, 373 U.S. 950 (1963). Thus, where there are legitimate reasons for the discharge of an employee, the question is whether those were in fact the only grounds for the dismissal, or whether they were "put forth as a mere pretext to justify an impermissible discharge." *N.L.R.B.* v. *Milco, Inc., supra* at 138.

In this instance, the Trial Examiner relied on several factors in determining that the Company dismissed Collins not for his inadequate performance on the job, but because of his leadership in organizing the Company's employees. First, he noted that Collins was told at the time he was hired that the Company did not expect him to become proficient at his work for approximately a year, and the Examiner reasonably inferred from this that the nature of the job was such that the Company must have expected a new employee such as Collins to make mistakes. Second, he observed that although Collins' initial errors came to the Company's attention in the first week of his employment, no action was taken until two weeks later, at which time, and within hours after Knell received the Union's request for recognition, Collins was

summarily discharged. And finally, the Trial Examiner found his conclusion that the reason for the discharge asserted by the Company was merely a pretext buttressed by the fact that Grant and Thuotte gave somewhat divergent, if not actually conflicting reasons for their joint action.

Although these factors do not lead inescapably to the conclusion reached by the Trial Examiner and the Board, they do offer it substantial support. See *N.L.R.B.* v. *Great Eastern Color Lithographic Corp., supra; N.L.R.B.* v. *United Mineral & Chemical Corp.*, 391 F. 2d 829 (2d Cir. 1968). The Company, nevertheless, argues that we should reverse the Board because there is no proof that it actually knew of Collins' union activities prior to his discharge. But although such knowledge is a necessary ingredient of a violation of § 8(a)(3), it need not be established by direct evidence; inferences may be drawn from the surrounding circumstances. In view of the evidence that, 1) the Company knew Collins had been a union member when it hired him, 2) there were only a small number of employees in the Company's plant and most of Collins' activity on behalf of the Union was conducted in the plant during working hours, *N.L.R.B.* v. *Joseph Antell, Inc.*, 358 F. 2d 880 (1st Cir. 1966) (the "Small Plant Doctrine"), and 3) Collins' discharge occurred abruptly within hours after the Company received the Union's request for recognition, we believe there was substantial evidence to justify the conclusion that the Company had knowledge of Collins' union activity. Accordingly, we affirm the finding that Collins' discharge was in violation of § 8(a)(3).

III

With respect to the other alleged unfair labor practices, the Trial Examiner found, and the Board

agreed, that the Company had violated § 8(a)(5) by refusing to bargain with the Union and then by bargaining directly with the employees, and that it had violated § 8(a)(1) by causing the employees to repudiate the Union. As to the first charge, the Company's response is that it was justified in refusing to bargain with the Union because it believed the bargaining unit which the Union claimed to represent (all 15 of the employees) was inappropriate and because it had a good faith doubt that the Union had been authorized by a majority of the employees to represent them. The Trial Examiner found, however, that in view of the similarity of conditions under which all the employees worked, and the overlapping of their functions and supervision, all the employees shared a large measure of community interest and hence constituted an appropriate unit for purposes of collective bargaining. *United Aircraft Corp.* (*Hamilton Standard Div.*) v. *N.L.R.B.*, 333 F. 2d 819 (2d Cir. 1964), cert. denied 380 U.S. 910 (1965). Moreover, the Trial Examiner reasoned that the coverage of the two servicemen in the contract between the Company and the Plumbers Union did not preclude their inclusion in the bargaining unit, since they were dual-function employees, and the Plumbers Union contract was operative only for the short period during the year when they were doing the specialized work of installing oil burners in buildings under construction. Since we find this result well within the Board's discretion, we see no reason to upset the determination that the bargaining unit chosen by the Union was an appropriate one. *N.L.R.B.* v. *Sunrise Lumber & Trim Corp.*, 241 F. 2d 620 (2d Cir.), cert. denied 355 U.S. 818 (1957).

Furthermore, the law is settled that a sincere belief that a bargaining unit chosen by the union is improper does not constitute a defense to a violation

of § 8(a)(5) where that unit is in fact an appropriate one. *United Aircraft Corp. (Hamilton Standard Div.)* v. *N.L.R.B., supra; Florence Printing Co.* v. *N.L.R.B.*, 333 F. 2d 289 (4th Cir. 1964).

The Company contends, moreover, that the employees were induced to sign the Union authorization cards by misrepresentations as to their purpose and hence such cards should not be considered evidence of a Union majority. However, the Trial Examiner found, and his findings are supported by the evidence, that the cards unequivocally authorized the Union to represent those who signed for the purpose of collective bargaining, and that no misrepresentations were made by Collins or any other Union representative to the employees at the time they signed the cards.[6] The only evidence offered by the Company in support of its contention was the testimony of several employees that they were under the impression the cards were intended for a purpose other than authorizing the Union to represent them. We believe that the Trial Examiner was correct in concluding that where an authorization card is clear on its face, and union representatives have made no misrepresentations with respect to it, an employee's thoughts as to what he believed was the purpose to be served by the card cannot be used to discredit a majority the Union has legitimately achieved. *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F. 2d 732, 743 (D.C. Cir. 1950), cert. denied, 341 U.S. 914 (1951). Furthermore, we believe the Trial Examiner's finding that the Company's discharge of Collins and commencement and abrupt ter-

[6] The Trial Examiner did find that Collins misrepresented to one of the employees that he was the only one who had not signed a card when in fact at the time only six of the fifteen had done so. For this reason, he discounted Emery's card in ascertaining the Union's majority status.

mination of direct bargaining with the employees indicated the Company's bad faith in refusing to bargain is adequately supported by the evidence and should be affirmed. Additionally, since the Union was authorized by a majority of the employees in an appropriate bargaining unit to represent them, the Company's direct bargaining with the employees constituted an independent violation of § 8(a)(5). *Medo Photo Supply Corp.* v. *N.L.R.B.*, 321 U.S. 678 (1944).

Finally, the Trial Examiner and Board found that by first meeting directly with the employees and instilling in them the expectation that it would improve their conditions of employment, and then withdrawing its offer for future negotiations because they had signed authorization cards, the Company had induced the employees to repudiate the Union in violation of § 8(a)(1). Although the evidence was not overwhelming that the Company's conduct was in fact the cause of the employees' decision to withdraw from the Union, the Board's inference was reasonable, and in view of its special qualifications to determine the effects of such actions on the minds of the employees, *N.L.R.B.* v. *Stow Manufacturing Co.*, 217 F. 2d 900 (2d Cir. 1954), cert. denied 348 U.S. 964 (1955), we do not feel it appropriate to disturb their determination.

IV

Having found that the Company's conduct described above did violate § 8 (a)(1) and (5), we are left with the question whether the remedy ordered by the Board—direct bargaining with the Union—is appropriate in this case. It is well established that the Board may properly order an employer found to have committed unfair labor practices to bargain directly

with a Union which lost its majoity subsequent to the employer's wrongful refusal to bargain with it. *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702 (1944). Nevertheless, we are not unmindful of the potency of such a remedy. Since it dispenses with the necessity of an election, there is always the risk that a bargaining representative may be imposed on employees, at least for a time, when they no longer wish it to represent them. *N.L.R.B.* v. *Flomatic Corp.*, 347 F. 2d 74 (2d Cir. 1965); *N.L.R.B.* v. *Better Val-U Stores of Mansfield, Inc*, —— F. 2d —— (2d Cir. decided September 10, 1968).

A bargaining order is clearly appropriate "where the employer's conduct has been so flagrantly hostile to the organizing efforts of a union" that any future election would be tainted by his past transgressions. *N.L.R.B.* v. *Flomatic Corp.*, *supra* at 78. But here there has been no such display of flagrant hostility as would suggest that a future election would not actually reflect the desires of the employees. The conduct of the Company to which the Board attributes the employees' defection from the Union was hardly vituperative; indeed it seems more the result of inadvertence than anything else. We recall that it was the employees who initiated the direct bargaining, and that Knell had attempted unsuccessfully to get legal advice before he began conferring with them but his Counsel was not available. When his lawyer returned his call and advised Knell that he could not confer with the employees, he promptly terminated the talks. Of course, these circumstances provide no defense to the unfair labor practice charges, but they do suggest that the climate generated by the Company's actions was not one of hostility and coercion. Moreover, we would be especially hesitant to assume in this case that the employees now desire to be represented by the

Union in view of the fact that only a slim majority of the employees ever signed the authorization cards,[7] and that the employees had in all but a fleeting association with the Union.

We note the dissenting opinion stresses that the appropriateness of a bargaining order should stand or fall simply on which section of the Act has been violated without regard to or examination of the facts which constituted the violation. Thus, it argues that the fact that in this case, unlike *Flomatic* and *Better Val-U Stores*, the employer was found to have violated § 8(a)(5) should cause us to enforce the order by rote. We suggest, however, that the finding of an unlawful refusal to bargain does not *ipso facto* and in all cases lead to the conclusion that an order to bargain must always be the only remedy for the violation. And, we do not take action here, as the dissenting opinion suggests, which is inconsistent with those cases subsequent to *Flomatic* in which we held a bargaining order to be an appropriate remedy for an 8(a)(5) violation based upon a card majority. In each of those cases, the conduct on which the unfair labor practice findings were predicated was found to be clearly hostile to the union, and without question to have contaminated the results of any future election. Indeed, Judge Hays speaking for the majority in *Bryant Chucking Grinder Co.* v. *N.L.R.B.*, 389 F. 2d 565, 568 (2d Cir. 1967) made it clear that the bargaining order was appropriate (in § 8(a)(1) cases) because "the employer deliberately destroyed the union's majority." And, in examining those cases in which the possible applicability of *Flomatic* was considered and then rejected we observe that in *N.L.R.B.* v. *Consolidated*

[7] The Trial Examiner found that the Union represented eight of the employees on September 9, when it first requested recognition.

Rendering Co., 386 F. 2d 699 (2d Cir. 1967), the employer was found to have violated 8(a)(1) by threats of reprisals, promises of benefits and coercive interrogation of its employees, all of which were for the purpose of causing the Union's majority to be dissipated and had the effect of making a free election impossible; and in *N.L.R.B.* v. *Gotham Shoe Mfg. Co.*, 359 F. 2d 684 (2d Cir. 1966), the employer similarly engaged in a course of conduct, including threats and promises, the purpose of which was to destroy the Union's majority; also in *Irving Air Chute Co.* v. *N.L.R.B.*, 350 F. 2d 176 (2d Cir. 1965), the employer in addition to violating §§ 8(a)(1) and (2) by threatening its employees and attempting to form a company dominated bargaining committee, had clearly demonstrated the bad faith of its refusal to bargain by refusing even to examine the authorization cards evidencing the union's majority. Thus, contrary to our dissenting brother's view, those cases are in no way undercut by our holding on the particular facts before us, where the employer's unfair labor practices have been as minimal as we have indicated and its conduct does not preclude a fair election in the future, and particularly where there is a considerable doubt as to the employees' continued desire to be represented by the Union.

Accordingly, we believe that the Board should have permitted the bargaining representative to be determined by an election held within a reasonable time. A bargaining order in this case would be excessively strong medicine for the ailment and unfair not only to the employer but to the employees as well.

The Board's order will be enforced in all respects except that the direction to bargain is modified as set forth above.

HAYS, *Circuit Judge* (dissenting):

This case illustrates the particularly pernicious effect of a case which erroneously decided in the first place, is gradually broadened to cover other situations never contemplated by the first decision.

In *NLRB* v. *Flomatic Corporation*, 347 F. 2d 74 (2d Cir. 1965), this court decided that the Board could not, under the circumstances there presented, employ a bargaining order to correct a situation in which it had found a Section 8(a)(1) violation. The relevant circumstance on which the court principally relied was that the Section 8(a)(1) violation was not "flagrant."

> "There was no aggressive or planned campaign aimed at dissipating union strength by resort to threats, discharges or refusals of recognition. On the contrary, the Board found that the employer was never asked to bargain, and there was evidence that he even expressed a willingness to do so if the employees wanted union representation." 347 F. 2d at 78.

The court went on to say:

> "[T]he courts have implicity recognized that the bargaining order remedy should be applied with restraint, and accordingly have enforced such orders in cases of §§ 8(a)(2), 8(a)(3) and 8(a)(5) violations, some of which were coupled with or included § 8(a)(1) transgressions. [Citing cases.] Those cases involved more glaring violations than the one found here, and where as in § 8(a)(5), an employer has refused to bargain, under circumstances in which he was under a duty to do so because the union enjoyed the status of exclusive bargaining agent, the remedy may be thought uniquely appropriate. No court, however, has held that a borderline, unaggravated § 8 (a)(1) violation, standing alone, occurring prior to an election, warranted a bargaining order." 347 F. 2d at 79.

Thus it is perfectly clear that *Flomatic,* as it was originally decided, stood solely for the narrow proposition that where there was only a non-flagrant Section 8(a)(1) violation, the Board could not order the employer to bargain.

Flomatic was first extended beyond its original limits in *NLRB* v. *Better Val-U Stores,* slip op. 3431, Docket No. 32009 (2d Cir September 10, 1968). In that case there was not only a violation of Section 8(a)(1) but also a violation of Section 8(a)(3) by the discharge of an employee. In spite of the express language of *Flomatic* as to "discharges" and "Section 8(a)(3)" violations, quoted above, the court said [W]e feel compelled by the facts in our case to follow the majority view in *Flomatic.*"

However, in *Better Val-U* the court said:

> "To require an employer to reinstate an employee with back pay, to cease and desist from further unfair labor practices, and to post appropriate notices are proper and accepted remedies for violations of Sections 8(a)(1) and 8(a)(3). See, e.g., *NLRB* v. *A. P. W. Products Co.,* 316 F. 2d 899 (2 Cir. 1963); *NLRB* v. *Firedoor Corp. of America,* 291 F. 2d 328 (2 Cir.), *cert. denied,* 368 U.S. 921 (1961). Accordingly, to this extent we grant enforcement of the Board's order without further comment. However, the Board's imposition of a bargaining order where no violation of Section 8(a)(5) was found to have occurred is a more troublesome matter * * *.
>
> The controlling test in this circuit as to whether a bargaining order is appropriate in a situation where there was no finding of a refusal to bargain by the employer in violation of § 8(a)(5) of the Act was announced by Judge Anderson in *NLRB* v. *Flomatic Corp.,* 347 F. 2d 74 (2 Cir. 1965)." Slip opinion p. 3435.

Thus there can be no doubt that, although the *Flomatic* rule was extended by *Better Val-U* to cover a Section 8(a)(3) violation, there was no intention to extend that case to cover a situation where the Board had found a Section 8(a)(5) violation and was upheld by the court in such a finding. In fact in such a case, the court said in *Flomatic,* a bargaining order "may be thought uniquely appropriate."

During the period since *Flomatic* this court has on several occasions enforced the Board's bargaining orders on the basis of a finding of Section 8(a)(5) violations based on a card count. See *NLRB* v. *Big Ben Department Stores, Inc.,* 396 F. 2d 78 (2d Cir. 1968); *Bryant Chucking Grinder Co.* v. *NLRB,* 389 F. 2d 565 (2d Cir. 1967); *NLRB* v. *Consolidated Rendering Co.,* 386 F. 2d 699 (2d Cir. 1967); *NLRB* v. *Divigard Baking Co.,* 367 F. 2d 389 (2d Cir. 1966); *NLRB* v. *Gotham Shoe Mfg. Co.,* 359 F. 2d 684 (2d Cir. 1966); *Irving Air Chute Co.* v. *NLRB,* 350 F. 2d 176 (2d Cir. 1965).

The majority, overruling *sub silentio* all the intervening cases, now pushes *Flomatic* an enormous distance farther than it has previously been extended and condemns a bargaining order in a case where there was a violation of the duty to bargain under Section 8(a)(5) and where the court has upheld the Board in its finding of such a violation.

It is obvious that the result reached here is not only not required by *Flomatic* and *Better Val-U* but that it is directly at variance with the reasoning of those cases. Moreover it is contrary to numerous previous decisions of this court and contrary to the holding of the Supreme Court in such cases as *Franks Bros. Co.* v. *NLRB,* 321 U.S. 702 (1944).

APPENDIX B

In the United States Court of Appeals, for the Second Circuit

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No. 32,120

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE PEMBEK OIL CORPORATION, RESPONDENT

JUDGMENT

Before LUMBARD, *Chief Judge,* KAUFMAN and HAYS, *Circuit Judges.*

This cause came on to be heard upon a petition of the National Labor Relations Board for enforcement of its order, dated June 14, 1967, against the above-named Respondent, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on October 30, 1968, and has considered the briefs and transcript of record filed in this cause. On November 27, 1968, the Court, being fully advised in the premises, handed down its opinion granting enforcement of the Board's order as modified. In conformity therewith, it is hereby

Ordered and adjudged by the Court that Pembek Oil Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or inducing employees to repudiate International Brotherhood of Teamsters, Chauffeurs,

Warehousemen and Helpers of America, Local Union No. 677, or any labor organization.

(b) Causing or inducing employees to rescind the authority of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other labor organization, to represent them for purposes of collective bargaining.

(c) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other labor organization, by discriminating against employees in regard to hire or tenure of employment or any term or condition of employment.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act, as amended, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment in conformity with Section 8(a)(3) of the Act.

2. Take the following affirmative action which, the Board has found, will effectuate the policies of the National Labor Relations Act, as amended:

(a) Make Carl Collins whole for any loss of earnings he may have suffered by reason of the discrimination practiced against him in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the National Labor Relations Board or its agents, for examination or copying, all payroll records, social security payment records, timecards, personnel records or reports, and all other records necessary or useful to determine the amount of backpay due under the terms of this judgment.

(c) In the event that the Board hereafter holds an election among respondent's employees in the following appropriate unit:

> All employees employed by respondent, including fuel truck drivers, installation men, servicemen, power cleaners, also known as sootmen, and maintenance men, excluding salesmen, office clerical employees and supervisors as defined in the Act.

in which a majority of the valid ballots are cast for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677 as the exclusive collective-bargaining representative of said employees, upon request, recognize and bargain collectively with said Union as such representative concerning rates of pay, wages, hours, or other terms or conditions of employment.

(d) Post, at its premises copies of the attached notice marked "Appendix". Copies of said notice, to be furnished by the Regional Director for Region 1 of the National Labor Relations Board (Boston, Massachusetts), after being signed by an authorized representative of respondent, shall be posted by respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify said Regional Director, in writing, within 10 days from the date of this judgment, what steps respondent has taken to comply herewith.

J. EDWARD LUMBARD,
Judge, United States Court of Appeals for the Second Circuit.
IRVING R. KAUFMAN,
Judge, United States Court of Appeals for the Second Circuit.

Filed: DECEMBER 19, 1968.

Appendix

NOTICE TO ALL EMPLOYEES

Pursuant to a judgment of the United States Court of Appeals Enforcing as modified an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

After a trial in which both sides had the opportunity to present their evidence it has been found that we violated the law by committing unfair labor practices and we have been ordered to post this notice and to keep the promises that we make in this notice.

We will not cause, induce, request, or encourage you to repudiate, withdraw or resign, from International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other union.

We will not cause, induce, request, or encourage you to cancel, or seek the return of, any card you may have signed naming, authorizing, or designating International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other union, to act as your collective-bargaining representative.

We will not discourage union activity or membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other union, by discriminating against you if you choose to engage in union activity, or if you join International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America, Local Union No. 677, or any other union.

We will not in any other way interfere with, restrain, or coerce you in the exercise of any rights guaranteed to you by the National Labor Relations Act. In this connection, we will respect your rights to self-organization, to form, join, or assist any union, to bargain collectively through any union or representative of your choice as to wages, hours of work, and any other term or condition of employment. You also have the right, which we also will respect, to refrain from doing so.

We will not discriminate against any employees for engaging in union activity or for joining any union. Since it has been found that we did so when we fired Carl Collins, to whom we have already offered full reinstatement to his old job, we will pay him for any loss he suffered because we fired him.

In the event that the Board hereafter holds an election among the employees in the following appropriate unit:

> All persons whom we employ, including fuel truck drivers, installation men, servicemen, power cleaners, also known as sootmen, and maintenance men, but excluding salesmen, office clerical employees and supervisors.

in which a majority of the valid ballots are cast for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, as the exclusive representative of the employees in that unit, we will, upon request, bargain collectively with that Union as such representative with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and put into writing and sign any agreement which is reached.

All our employees are free to become, remain, or refrain from becoming or remaining, members of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other union.

THE PEMBEK OIL CORPORATION
(Employer)

Dated_____ By_____
(Representative) (Title)

The notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 20th Floor, John F. Kennedy Federal Building, Cambridge and New Sudbury Streets, Boston, Massachusetts 02203, Telephone 223-3300.

A true copy.

A. DAVID FUSARO,
Clerk.

In the United States Court of Appeals for the Second Circuit

No. 32120

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE PEMBEK OIL CORPORATION, RESPONDENT

A petition for a rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
IRVING R. KAUFMAN,
PAUL R. HAYS,
(dissenting)
Circuit Judges.

JANUARY 16, 1969.

In the United States Court of Appeals for the Second Circuit

No. 32120

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE PEMBEK OIL CORPORATION, RESPONDENT

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner and all of the active judges concurring, except Judge Hays who votes to grant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
Chief Judge.

JANUARY 16, 1969.

APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 1-CA-5652

THE PEMBEK OIL CORPORATION

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 677

DECISION AND ORDER

On March 21, 1967, Trial Examiner Alvin Lieberman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal of these allegations. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision together with a supporting brief, and the General Counsel filed a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, The Pembek Oil Corporation, Meriden, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C., June 14, 1967.

GERALD A. BROWN,
HOWARD JENKINS, Jr.,
SAM ZAGORIA,

Members,

[SEAL] *National Labor Relations Board.*

[1] In the absence of exceptions, we adopt *pro forma* the Trial Examiner's finding that employee Emery's authorization card is invalid because he signed it on the misrepresentation that he was the only employee in the unit who had not signed a card. *Phil-Modes, Inc.*, 159 NLRB No. 84; *Dan Howard Mfg. Co.*, 158 NLRB No. 54; cf. *Merrill Axle and Wheel Service*, 158 NLRB No. 107.

TXD–101–67
Meriden, Conn.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Case 1–CA–5652

THE PEMBEK OIL CORPORATION
and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 677

Norman Zankel, Esq., Boston, Mass., for the General Counsel.
Mr. James Galullo, Waterbury, Conn., for the Charging Party.
William J. Larkin, 2d. Esq., Waterbury, Conn., for Respondent.
Before ALVIN LIEBERMAN, *Trial Examiner*.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard by me in Meriden, Connecticut, on November 28, 29, and 30, 1966[1] upon a complaint of the General

[1] All dates referred to in this Decision fall within 1966.

Counsel [2] and respondent's answer. The issues litigated were whether respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (herein called the Act). More particularly, the questions for decision are as follows:

1. Did respondent violate Section 8(a)(3) and (1) by discharging Carl Collins? [3]

2. Was the unit for which the Union requested recognition from, and bargaining with, respondent appropriate for those purposes?

3. Did the Union represent a majority of respondents' employees in a unit appropriate for collective bargaining when the foregoing request was made?

4. Did respondent violate Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union, by

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[2] The complaint was issued on a charge filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677 (herein called the Union). During the trial the complaint was amended to set forth the name of the Union as it appears in the caption and by substituting for paragraph 10, as originally set forth, the following paragraph:

"10. All employees employed by Respondent at West Main Street, Meriden, Connecticut including fuel truck drivers, installation men, servicemen, soot men, but excluding salesmen, office clerical employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act."

[3] On motion of respondent made at the conclusion of the General Counsel's case-in-chief paragraph 8 of the complaint which alleges that respondent failed and refused to reinstate Collins and so much of paragraph 9 and other paragraphs of the complaint which relate to paragraph 8 were dismissed for the reason that the General Counsel offered no evidence to establish those allegations. I have been urged by the General Counsel to reconsider this ruling and I have done so. Having reconsidered and having taken into account the General Counsel's arguments I find no convincing reason for changing my ruling.

bargaining directly with its employees, by inducing them to abandon a lawful strike, or by inducing them to repudiate the Union?

Upon the entire record,[4] upon my observation of the witness and their demeanor while testifying, and upon careful consideration of the arguments made and briefs submitted by the General Counsel and respondent, I make the following:

FINDINGS OF FACT[5]

I. Respondent's business

Respondent, a Connecticut corporation, whose principal office and place of business is located at Meriden, Connecticut, is engaged there in the installation and servicing of oil burners and related equipment and in the retail sale of fuel oil. Respondent annually purchases and receives products valued in excess of $50,000 from suppliers located outside the State of Connecticut and respondent's gross volume of business annually exceeds $500,000. Accordingly, I find that respondent is engaged in commerce within the meaning of the Act and that the assertion of jurisdiction over this matter by the National Labor Relations Board (herein called the Board) is warranted. *Siemons Mailing Service,* 122 NLRB, 81, 85; *Carolina Supplies and Cement Co.,* 122 NLRB 88, 89.

II. The labor organization involved

The Union is a labor organization within the meaning of the Act.

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[4] Attached hereto as Appendix B is an order correcting the stenographic transcript of this proceeding in certain respects.

[5] The motion to dismiss the complaint made by respondent at the close of the trial is disposed of in accordance with the findings and conclusions set forth in this Decision.

III. The alleged unfair labor practices

A. Introduction

Briefly, this case concerns itself with the events following the Union's authorization by respondent's employees to act as their collective-bargaining representative. Among these were the Union's demand for, and respondent's refusal of, recognition and bargaining; the discharge of one employee; a strike; respondent's direct bargaining with the striking employees; and, coming full circle, the employees' repudiation of the Union.

The General Counsel contends that respondent's refusal to recognize and bargain with the Union pursuant to its demand was based upon its determination to gain time within which to destroy the Union's status as the collective-bargaining representative of the employees concerned, hence in violation of 8(a)(5) of the Act. In support of this argument the General Counsel points to respondent's discharge of an employee, claimed by the General Counsel to have been discriminatory and, accordingly, violative of Section 8(a)(3) of the Act; to its direct bargaining with employees who had earlier signed cards authorizing the Union to act as their collective-bargaining agent which, the General Counsel postulates, induced the employees involved to abandon a lawful strike and repudiate the Union, all in violation of Section 8(a)(1) and 8(a)(5) of the Act.

Taking issue with the General Counsel on all points respondent argues that it has not violated Section 8(a)(5) of the Act by its refusal to accede to the Union's demand for recognition and bargaining because of its good-faith doubt as to the Union's claim that it represented a majority of its employees; because the unit for which the Union requested recogni-

tion is not appropriate for collective-bargaining purposes; and because the authorization cards, upon which the Union's majority is bottomed, are invalid by reason of misrepresentations in their procurement. Further respondent argues that it did not engage in direct bargaining with the employees concerned and that any dealing by respondent directly with its employees was discontinued immediately upon its being advised that such conduct might be, in the circumstances of this case, improper. Running out the skein, insofar as this phase of the case is concerned, respondent contends that its direct dealing with its employees, did not induce them to abandon their strike or to repudiate the Union. Finally, while admitting the discharge, respondent asserts that it was occasioned solely by the many errors made by the employee in question and that it had no prior knowledge of his activities on behalf of the Union.

B. Facts

The nature of respondent's operations

Respondent installs and services oil burners in existing commercial establishments and homes, the former being referred to as industrial work and the latter as domestic work. In addition, respondent on occasion installs oil burners in buildings under construction and regularly sells fuel oil.

Insofar as material, in the operation of its business respondent employs installer-servicemen, power cleaners, oil truck drivers (herein respectively called servicemen, sootmen, and drivers) and a maintenance man. The usual duties of the servicemen, who exercise skills not possessed by respondent's other employees, consist of installing, servicing, and repairing industrial and domestic oil burners and related equipment, in existing buildings. During the period critical

to this proceeding respondent employed eight servicemen, of whom six did both industrial and domestic work. Of these, two also installed oil burners in buildings under construction. This work, however, occupied their time for only about 6 weeks a year. The remaining two servicemen did only domestic work.

Respondent's drivers deliver fuel oil to its customers, compute the amount of money due from customers for the oil delivered by them, and enter this sum on an invoice which is left with the customer at the time of the delivery. Although their principal duties relate to the delivery of fuel oil, the drivers also assist servicemen. This type of work is done by the drivers for about 2 or 3 months a year, generally in the summertime, when there are little, or no, deliveries to be made. As John W. Grant, respondent's secretary, testified, "in a given week [during this period a driver could spend] all his time or 90 per cent of his time" assisting servicemen.

The sootmen clean oil burners and related equipment. On rare occasions sootmen also assist servicemen. The maintenance man, as Grant further testified, "keeps [the shop] clean" and "takes care of the stock."[6]

Respondent is party to a collective-bargaining contract with Local Union No. 21, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry (herein called Plumbers

[6] The findings with respect to the duties of respondent's employees are based on the testimony of Grant; Fred J. Knell, respondent's president; Robert J. Thuotte, its office manager and dispatcher; Thomas F. Yale, a driver employed by respondent; and Carl Collins, who was employed as a driver by respondent and whose discharge is claimed by the General Counsel as having been violative of Section 8(a)(3) of the Act.

Union).[7] This contract covers two of respondent's employees, the servicemen who install oil burners in buildings under construction. It is applicable, however, only when they perform this type of work, which, as I have found, they do for about 6 weeks during each year. The contract has no relevance when the employees concerned perform the usual functions of servicemen: i.e., installing, servicing, and repairing oil burners in existing buildings.[8]

The maintenance man spends all his working time in respondent's warehouse. The servicemen, sootmen, and drivers work there when they are not performing duties away from respondent's premises.

The sevicemen, sootmen, drivers, and maintenance men are hourly rated and each has a timecard. Except for the maintenance man, they wear the same work uniform. All, including the maintenance man, benefit from an insurance program maintained by respondent,[9] have the same vacation and sick leave privileges, and, as Grant, respondent's secretary related, share the same restroom "and other facilities in the shop." [10]

At the trial it was stipulated that Knell, Grant, Thuotte, and Arthur Moskaluk, respectively respondent's president, secretary, office manager and dispatcher, and sales engineer, are its only supervisors. As respondent's president, Knell is "overseer of the whole operation."

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[7] Insofar as it may be material, I find that Plumbers Union is a labor organization within the meaning of the Act.

[8] These findings are based on the contract between respondent and Plumbers Union, which is in evidence as respondent's Exhibit 10 and the testimony of Knell, respondent's president.

[9] The two servicemen covered by the Plumbers Union contract participate additionally in a health, welfare, and pension program provided for by that agreement.

[10] The findings in this paragraph are based on Grant's testimony.

Respondent's sales engineer assigns work to all servicemen, "directs the activities" of those performing industrial work, and, on occasion, also directs the work of the sootmen, drivers, and maintenance man. Whenever a serviceman encounters "difficulty on [a] job," apparently without regard to whether the problem arises on industrial or domestic work, assistance is sought from, and given by, the sales engineer.

The work of the drivers, domestic servicemen, and maintenance man is normally supervised by the respondent's dispatcher. Respondent's secretary "directs the activity" of the sootmen and assists the sales engineer in assigning work to the servicemen. The dispatcher regularly "reports" to respondent's president, and from time to time to its secretary.[11]

Respondent's collective-bargaining history

It has already been found that respondent and the Plumbers Union are parties to a contract covering those of respondent's servicemen, presently two in number, who install oil burners in buildings under construction. Respondent has had similar contracts with the Plumbers Union since about 1950. However, no labor organization has ever represented all of respondent's employees.[12]

The Union's organizing campaign

Shortly after Collins started to work for respondent[13] he began to hear complaints from other em-

[11] The findings with respect to the functions of respondent's supervisors are based on Grant's testimony.

[12] These findings are based on the testimony of Knell and Grant, respectively respondent's president and secretary.

[13] As will appear below Collins, whose discharge, as already noted, is alleged by the General Counsel as having been violative of Section 8(a)(3) of the Act, was hired by respondent on August 19.

ployees concerning their working conditions, and, because he was a union member, was requested by several to "contact someone for them to talk to about a union." Accordingly, Collins communicated with James Galullo the Union's business representative, who sent authorization cards and literature to respondent's employees. Galullo also sent a supply of authorization cards to Collins, some of which Collins distributed among respondent's employees.

In addition to distributing the cards, Collins met with respondent's employees individually and in groups and informed them of the benefits to be derived from representation by the Union. There was also a meeting on September 13, at the Union's headquarters attended by some of respondent's employees and Galullo, the Union's business representative. At this meeting Galullo asked those present who had not signed cards to do so and received from the employees a series of proposals as to terms and conditions of employment which, as Galullo stated, "they wanted the union to negotiate on." [14]

The Union's requests for recognition and respondent's replies

By September 8, nine employees in the unit alleged in the amended complaint as being appropriate "for the purposes of collective bargaining" had signed cards authorizing the Union to act as their collective-bargaining representative.[15] On September 9, the Union, in writing, informed respondent that "a majority of [respondent's] truck drivers, oil burner

[14] These findings are based on testimony given by Collins and Galullo.

[15] This finding is based on the authorization cards received in evidence as General Counsel's Exhibits 11, 12, and 14 through 20, and the testimony of the employees who signed the cards in question except Robert Chiaro, whose whereabouts were unknown at the time of the trial.

servicemen and installers, mechanics, and helpers have authorized [the] Union to act as their collective bargaining representative," and, in essence, requested that respondent recognize, and bargain with, it as such representative.[16] On September 12, the Union filed a representation petition (Case 1–RC–9178) which was later withdrawn without prejudice.

Upon receipt of the Union's letter,[17] respondent retained counsel and turned the letter over to him. He, in reply, informed the Union, on September 13, that respondent disputed both the Union's majority claim and "the appropriateness of the unit." With respect to the authorization cards, respondent's lawyer stated that they were signed "solely for the purpose of obtaining a representation election * * * and, if not for that purpose, were signed based upon misrepresentations by representatives of your Union as to [their] import." It was further stated in this letter in ac-

[16] There is an apparent variance between the unit set forth in the Union's letter (General Counsel's Exhibit 2, in evidence) and that contained in paragraph 10 of the amended complaint (General Counsel's Exhibit 13, in evidence) which describes the unit as [a]ll employees employed by Respondent * * * including fuel truck drivers, installation men, servicemen, soot men, but excluding salesmen, office clerical employees and supervisors * * *." Respondent raises no issue concerning these seemingly different unit descriptions and concedes in its brief that the unit set forth in the amended complaint "is the same unit originally sought by the Charging Union." In view of this concession, I find that the two documents, i.e., the Union's letter and the General Counsel's amended complaint, in fact describe the same unit. As the unit description set forth in the amended complaint appears to be more artful than that contained in the Union's letter, all subsequent mention of the unit involved will have reference to the former, and, for the reasons set forth in footnote 53, *infra*, will be construed as including the maintenance man.

[17] The letter was received by respondent on September 12.

knowledgement of the Union's filing of its representation petition that respondent would recognize the Union "only" upon its certification by the Board.[18]

As previously mentioned, several employees of respondent attended a meeting at the Union's headquarters on September 13. At this meeting another employee in the unit, the 10th to do so, signed an authorization card.[19]

The following day, September 14, representatives of the Union and respondent met with agents of the Federal and State mediation services. As is usual in such situations, the parties met jointly and separately with the mediators. At one of the joint sessions the Union again requested recognition and bargaining and again respondent refused, stating on this occasion that the unit was inappropriate and that it would recognize the Union if it won a representation election.[20]

In view of respondent's contentions concerning the Union's "majority" and the invalidity of the authorization cards signed by its employees, findings must be made concerning the number of employees in the unit, and the circumstances surrounding the signing of the cards. Concerning the former, it was stipulated that at the time in question here respondent employed 8 servicemen, 4 sootmen, 2 drivers, and 1 maintenance man, a total of 15.[21]

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[18] These findings are based on the testimony of Knell and Grant, respectively respondent's president and secretary, and on the letter written by respondent's lawyer (General Counsel's Exhibit 6, in evidence).

[19] Like the other findings with respect to the signing of authorization cards, this finding is based upon the card, itself (General Counsel's Exhibit 21, in evidence), and the testimony of the employee who signed the card.

[20] These findings are based on the testimony given by Galullo, the Union's business representative, and Grant, respondent's secretary.

[21] In addition to these, respondent employed two office clerks.

As I have already found, 10 employees signed authorization cards. In pertinent part, these cards contain the following recital:

> I hereby authorize the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America to represent me for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

Respondent maintains that signatures to all the cards were obtained through misrepresentations sufficient to nullify them. In its brief respondent points particularly to four cards, those signed by William F. Carlson, Felix George Rouleau, James Emery, and Donald MacLellan, as being illustrative of the misrepresentations made by Collins, who solicited signatures on behalf of the Union, or by Galullo, the Union's business representative, to all the employees who signed cards.[22] Accordingly, respondent urges at least that the cards signed by these employees not be counted in determining the Union's majority. In detail, the events surrounding the signing of the cards in question are as follows:

William F. Carlson: Carlson, a serviceman in respondent's employ, received his card in the mail and signed it on September 1, after first reading it. Before

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[22] I do not agree that this is so. Thus, Thomas Yale, a driver testified that Collins merely told him he would receive a card in the mail and that he had no other conversation with Collins before reading and signing his card. Thomas Padden, a sootman, testified that before signing his card Collins told him that "it was a card that the union usually sends out . . . just to give them the authorization to negotiate." John Yale, a serviceman, could remember no conversation at all with Collins about the card which he signed, and Robert Parisi, also a serviceman, gave similar testimony, although he received the card which he signed from Collins.

receiving the card Carlson asked Collins whether he would become a member of the Union if he signed the card. Collins answer was "No." Collins further told Carlson that the cards would enable Galullo to "talk to the company on the empoyees' behalf." Although not so informed by any representative of the Union, Carlson concluded that the card "was only to show * * * the union that there were enough men interested in maybe forming a union"; that the Union would inform respondent of this fact; and that "then it would be up to us to decide whether or not we wanted to vote the union in." [23]

Felix George Rouleau: After receiving his card, but before signing it, Rouleau, a serviceman, asked Collins whether the card "would be binding us to the union in any way." Collins' response was that it would not; that the card was "introductory"; [24] and that Rouleau should "attend a meeting to see what the union had to offer." On the following day, September, 4, Rouleau read the card, signed it, and mailed it to the Union.[25]

James Emery: Emery, a sootman in respondent's employ, signed his card on September 7, after being told by Collins that "he was the last one" and that "everybody else had signed." [26]

Donald MacLellan: With other employees of respondent, MacLellan, a serviceman, attended the meet-

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[23] These findings are based on Carlson's testimony.

[24] In context this word appears to be meaningless.

[25] These findings are based on Rouleau's testimony.

[26] These findings are based on Emery's testimony. Emery also testified that he had decided to sign his card on the day before his conversation with Collins, during the course of which the card was signed. This testimony was elicited from Emery by a leading question from the General Counsel at a time when Emery was his witness. Accordingly, I will give it no weight. *Liberty Coach Company, Inc.*, 128 NLRB 160, 162.

ing held at the Union's headquarters on September 13. Galullo, the Union's business representative, told the assembled employees that among those present two had not signed authorization cards. Galullo, without saying more, then gave a card to MacLellan, who was one of those who had not yet signed. MacLellan signed the card at that time without reading it because, as he put it, there was "general conversation" among the employees "that we wanted to talk to the union, see what they had to offer and cards were more or less permission to talk to the Union." No representative of the Union was present at the time or times of this "general conversation" and although Collins was there he was not the person who told MacLellan that cards had to be signed by employees as a prerequisite to their talking to "the Union." [27]

Collins' discharge

Carl Collins was hired as a driver by respondent on August 19. He started to work the following day. He was discharged on September 17, several hours after respondent received the Union's recognition and bargaining request. At the time of the termination of his employment Collins was told by Grant, respondent's secretary, that he was being discharged because he made "too many mistakes in computing the price of fuel oil." Later that day Grant gave Collins a Connecticut Employment Security Division form, prepared by respondent and signed by Grant in which the "Reason for Unemployment" was stated to be "Inability To Figure Or Compute Prices." [28]

[27] These findings are based on testimony given by MacLellan, Rouleau, and Galullo.

[28] The finding concerning the conversation between Grant and Collins with respect to the reason for Collins' discharge is based on Collins' testimony. Grant's version of this conversation is that he told Collins that he was being discharged for "mak-

On about October 22, respondent offered to reinstate Collins to the job he held at the time of his discharge. Because Collins was then employed elsewhere, he refused respondent's offer.[29]

Prior to his employment by respondent Collins was interviewed by Grant and Thuotte, respondent's dispatcher. At the time Collins was wearing a union button and he told his interviewers that he had been a union member.[30] During this conference the duties of a driver's job were explained to him and Collins was told about "the job training". In the latter connection, Thuotte, as Collins testified, told him that he would "go out with another man for a while to learn the job and that [respondent] invested approximately a year in a man before he would become efficient like they like their employees to be."[31]

Findings concerning Collins' activity in support of the Union have already been made and appear under

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ing too many mistakes in the delivery of oil." Grant's account, as can be seen, differs from Collins' in that it omits any reference to the nature of the "mistakes." This is not a mere semantic distinction. It is material in view of respondent's position, as set forth in its brief, that Collins' discharge was occasioned not only by his errors in computation, but also by his mistakes in other areas. Because I was favorably impressed with Collins' demeanor as a witness and because his testimony as to the conversation in question is corroborated by the Connecticut Employment Security Division form (respondent's Exhibit 11, in evidence), which, as noted, was prepared by respondent and given to Collins on the day of his discharge, I accept Collins' version of the event rather than Grant's.

[29] These findings are based on Collins' testimony.

[30] In its brief respondent concedes that it had knowledge at the time Collins was hired that in the past he had been a member of a union.

[31] Collins' testimony in this regard was substantially corroborated by Thuotte who related that during the interview "It was said that the starting pay was not high because it takes quite a while for a man to be a good oil driver."

the heading "The Union's organizing campaign." The meetings mentioned there, at which Collins related to respondent's employees the advantages of union representation, were held in respondent's shop, the regular work station of the employees who attended, on a Saturday, and on other days of the week. Although Saturday is a regular workday for respondent's employees, none of respondent's supervisors were present in the plant at the time the Saturday meeting was held.

In addition to attending these shop meetings and there explaining the benefits obtainable by the employees through a relationship with the Union, Collins signed an authorization card, distributed others to employees, and engaged in discussions with them concerning the signing of the cards. Like the meetings, these, too, took place on respondent's premises.[32]

As found above, Collins worked for respondent as a driver from August 20, until his discharge on September 12, several hours after respondent's receipt of the Union's bargaining request. At that time, as has also been found, Grant, respondent's secretary, told Collins that he was being discharged because of his computation errors.

Collins did make errors in computing the total price of the oil which he delivered to respondent's customers. Collins made his first error of this nature on the very first day of his employment and continued to make similar errors.

Collins' mathematical deficiencies came to the attention of both Grant and Thuotte, respectively respondent's secretary and dispatcher, during his first week as a driver for respondent. Neither, however, spoke to Collins about this until Grant did so in connection with Collins' discharge on September 12, by which

[32] See, e.g., the testimony of Carlson, Parisi, and Rouleau.

date Collins had been in respondent's employ for more than 3 weeks.[33]

Not only did they not speak to Collins about any of his mistakes,[34] as set forth above, but also neither Grant nor Thuotte before September 12 had determined to take any disciplinary action against Collins because of them. During the morning of that day, however, after the Union's bargaining request had been discussed by Grant and Knell, respondent's president, and had been shown to Thuotte, Thuotte suggested to Grant that they "sit down and talk about [Collins]." They did so and jointly decided to discharge Collins.[35]

One final fact remains for consideration in connection with Collins' dismissal. Although, as Thuotte and Grant both stated, the decision to terminate Collins' employment was theirs jointly and was arrived at after a conference, each gave conflicting testimony with respect to this joint decision. Thus, Thuotte testified

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[33] During Collins' second week of employment Grant informed Padden, a rank-and-file employee, of Collins' computation errors and asked him to tell Collins about them. Padden, however, did not inquire nor did Grant say, what would happen if Collins' arithmetic did not improve. Although Padden relayed the substance of his conversation with Grant to Collins, he could not remember whether he did that before or after Collins' discharge.

[34] In addition to his computation errors, Collins spilled oil on the cellar floor of one of respondent's customers, and on the lawn of another; delivered oil to a customer other than the one it was intended for; gave a customer an invoice which should have been given to another; and on September 10, was unable to make a delivery at the time promised because he could not find the home of the customer who lived in a new section of the city.

[35] These findings are based on testimony given by Grant and Thuotte and the following exhibits received in evidence: General Counsel's Exhibits 3(a) through 3(h) inclusive; and respondent's Exhibits 4 and 5.

that he and Grant arrived at their joint determination to discharge Collins "based on this incident of Gumkowski [36] [and] the mistakes he made in figuring oil tickets." Grant, on the other hand, recited as the grounds for the joint decision the whole gamut of Collins' faults as a driver, including his computation errors, his spillage of oil on a customer's cellar floor, his delivery of oil to a customer who did not order any, his giving a customer an invoice which should have been given to another, and his failure to make a timely delivery of oil to a customer who lived in a new area of the city because he could not find the house.

The events following Collins' discharge

After his discharge Collins and several employees gathered at a local tavern where they talked about Collins' dismissal. In addition, the employees expressed an interest in meeting with Galullo, the Union's representative. Through Collins' efforts such a meeting was arranged for the following evening at the Union's headquarters.[37]

About 10 employees attended this meeting, which was chaired by Galullo. Galullo designated Collins as the Union's steward, discussed with the employees Collins' discharge, respondent's refusal to recognize the Union,[38] and outlined measures which might be

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[36] Gumkowski is the name of the person who owned the house in the new part of the city which Collins could not find in time to make his delivery at the hour promised.

[37] These findings are based on testimony given by Collins and Galullo.

[38] Although Galullo had not yet received respondent's letter informing the Union of its rejection of the Union's request for bargaining, respondent had, apparently earlier that day, posted a notice informing its employees that it would not recognize the Union, a copy of which was given to Galullo at the meeting.

taken, including a strike, to procure Collins' reinstatement and a collective-bargaining contract. In connection with the contract, the employees submitted to Galullo a paper on which was written the benefits they expected the Union to obtain for them through negotiation with the respondent. After considering the various courses which could be pursued, the employees decided to strike for the purposes of obtaining a contract and Collins' reinstatement.[39]

On September 14, almost all the employees who had attended the meeting the previous evening struck and picketed respondent's premises with signs stating "PEMBEK WORKERS ON STRIKE—TEAMSTER'S LOCAL NO. 677" and "WE PROTEST DISCHARGE OF OUR STEWARD—LOCAL NO. 677 TEAMSTERS WATERBURY." The strike was short lived, however, and, as appears below, was discontinued the next day.

Early during the morning of September 15, the striking employees decided among themselves to return to work. The strikers appear to have made this decision because the two servicemen in respondent's employ who were members of the Plumbers Union had not honored their picket line the previous day.

Having decided to terminate their strike Carlson, on behalf of all the employees involved, telephoned Grant, respondent's secretary, to ask whether they "could come in and sit down and talk." Upon Grant's acquiescence, the employees went to respondent's premises where they conferred with Knell, Thuotte, respectively respondent's president and dispatcher, and Grant.[40]

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[39] These findings are based on testimony given by Galullo, Carlson, and Rouleau and General Counsel's Exhibit 10, in evidence.

[40] These findings are based on testimony given by Carlson, Emery, Rouleau, and Grant.

Before the meeting started Knell, respondent's president, called its lawyer for advice as to the proper course which respondent should pursue in the circumstances. Respondent's lawyer, however, was not in his office at the time.[41]

Neither the employees nor respondent's officials who were present at the conference appear to have appointed a particular member to act as spokesman for their respective groups. Representatives of each spoke out at will.

The first to speak was Carlson who stated that the employees were there to discuss their "gripes." To this, Knell, respondent's president, replied, as Emery, one of the employees in attendance, testified, "that he had no idea things had gotten as bad as they were * * * that maybe * * * this was a good thing that it did come out * * * and that * * * we could straighten something out by having this get together." Grant, respondent's secretary, took a less conciliatory line, stating at the outset of the conference that he, too, had "gripes" and "wanted * * * an 8-hour day."

The employees then briefly mentioned some of the things with which they were concerned including the lack of a pension plan, and their desire to have a posted pay scale. There was also a cursory reference to sick and holiday pay. Respondent's representatives made no comment with respect to their employees' complaints, except as to pension and sick pay. Concerning the former, respondent's representatives indicated that respondent had already made inquiries in that area of several insurance companies. As to sick pay Grant stated that such benefits would not be provided where absence from employment was occasioned by the sickness of a member of the employee's family.

[41] These findings are based on Knell's testimony.

No specific proposals were presented by either side and no agreements were reached by respondent and its employees other than one to meet again during the following week. Carlson, one of the employees present, then suggested that they "go in the back shop" and prepare proposals for submission to respondent before the next meeting between the employees and respondent.

While the employees were so engaged, respondent's lawyer returned the call, which Knell had previously made to him. Upon being informed of what had happened respondent's lawyer absolutely forbade further meetings with the employees because, as Knell put it, "having signed the cards, they are considered members of the union, and until this thing is settled one way or the other, you cannot bargain with them no how." Grant and Knell immediately notified the employees that on advice of its lawyer respondent would not meet further with them. Upon being pressed for the reason Grant told the employees that respondent's attorney "has informed us that you have signed cards, and you are automatically represented by the Union." [42]

Later that day, September 15, the employees decided that they no longer desired the Union to represent them. Emery, an employee who participated in the decision, informed Galullo, the Union's business representative, of this, telling him that the employees "didn't want anything to do with the Teamsters Union . : . that they did not want them to represent [the employees; and that they] wanted out because [they] believed [they] were misled into it."

Subsequently, the employees concerned, except

[42] These findings are based on testimony given by Carlson, Emery, Knell, and Grant.

Collins, engaged a lawyer [43] and instructed him to notify the Union formally that they rescinded the authority previously given the Union to represent them for the purpose of collective bargaining. Such notices, on behalf of each employee involved, except Collins, were sent to the Union on October 5.[44]

C. Contentions and concluding findings as to respondent's alleged violation of Section 8(a)(3) of the act

Respondent contends that Collins was discharged because of the mistakes which he had made and that the termination of his employment was not related to his union activity. Moreover, respondent argues that the General Counsel has not established that respondent had knowledge of Collins' participation in the Union's organizing campaign. The General Counsel, in opposition, urges that Collins' discharge was attributable to his efforts on behalf of the Union and that it can be inferred that respondent had knowledge that Collins was so engaged while in its employ.

To be sure, knowledge such as respondent claims it did not have is a necessary ingredient of a violation of Section 8(a)(3) of the Act and must be shown to have existed before an unfair labor practice within the meaning of that section can be said to have occurred. Although there is no direct evidence to establish that respondent had knowledge of Collins' activities on behalf of the Union, it is settled law "that direct knowledge of an employee's concerted or union activities is [not] a *sine qua non* for finding that he has been discharged because of such activities.

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[43] It does not appear that the lawyer chosen by the employees had any relationship with respondent or its attorney.

[44] These findings are based on testimony given by Emery and Carlson and on respondent's Exhibits 7(a) through 7(j) in evidence.

On the contrary, there is well established. * * * precedent that such knowledge may be inferred from the record as a whole." *Wiese Plow Welding Co., Inc.*, 123 NLRB 616, 618.

Considering the "record as a whole", I conclude, as did the Board in *Wiese*, "that such an inference should and must be drawn" in the instant case, particularly in the light of the following factors, most of which were also present in *Wiese:* (1) respondent's knowledge at the time it hired Collins that he had been a member of a union in the past and "was thus a potential source of union organization";[45] (2) the small number of employees in respondent's plan;[46] (3) Collins' proselytizing on behalf of the Union among his coworkers almost from the very start of his employment by respondent, much of which was done on plant premises during working hours; and (4) the timing of Collins' discharge, which occurred abruptly and

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[45] *Texas Industries, Inc.*, 156 NLRB 423, 426.

[46] It will be remembered, in this regard, that exclusive of two office clerks, respondent's entire complement consisted of 15 employees. In *Wiese Plow Welding Co., Inc.*, 123 NLRB 616, 618, on which I place considerable reliance for my finding of "company knowledge" the number of employees involved was "approximately 13." In other cases in which the Board made a similar finding based in part on the fact that the plant in question was small, the total number of employees ranged from 9 to 130. See, e.g., *New French Benzol Cleaners and Laundry, Inc.*, 139 NLRB 1176, 1179, 1190 (9 employees); *Allied Distributing Corporation*, 130 NLRB 1348, 1349, 1350, enfd. 297 F. 2d 679 (C.A. 10) (13 employeees); *Tru-Line Metal Products Company*, 138 NLRB 964, 966, 972, enfd. 324 F. 2d 614 (C.A. 6) (36 employees); *Stokeley Foods, Inc.*, 91 NLRB 1267, 1270, 1277 (75 employees); *Malone Knitting Company*, 152 NLRB 643, 644, 647, enfd. 358 F. 2d 880 (C.A. 1) (80–90 employees); *Quest-Shon Mark Brassiere Co., Inc.*, 80 NLRB 1149, 1150, enfd. 185 F. 2d 285 (C.A. 2) (130 employees).

without prior warning[47] several hours after respondent received the Union's bargaining request.

Having concluded that respondent had knowledge of Collins' activities on behalf of the Union, it must next be determined whether respondent was motivated by antiunion considerations in discharging Collins, as the General Counsel urges, or solely because of his mistakes, as respondent contend. If the former is the case, then, clearly, Collins' discharge violated Section 8(a)(3) of the Act. *N.L.R.B.* v. *Great Eastern Color Lithographic Corporation,* 309 F. 2d 352, 355 (C.A. 2), cert. denied 373 U.S. 950. If the latter, then, equally clearly, respondent's termination of Collins' employment did not constitute an unfair labor practice. *Mitchell Transport, Inc.,* 152 NLRB 122, 123, affd. *sub nom. Hawkins* v. *N.L.R.B.,* 358 F. 2d 281 (C.A. 7).

On the record of this case, respondent's claim that it dismissed Collins because of his mistakes does not appear to be well taken. It seems to me, in this connection, that respondent expected new employees, such as Collins, to make mistakes, else why would Thuotte, respondent's dispatcher, have told Collins when he was hired that respondent "invested approximately a year in a man before he would become efficient." Furthermore, Collins' faults came to respondent's attention during the first week of his employment. He was, nevertheless, permitted to continue working for an

[47] I do not construe the conversation between Grant, respondent's secretary, and Padden concerning Collins' computation errors as constituting an "informal warning" to Collins, as respondent contends in its brief. First, Grant did not tell Padden that disciplinary action would be taken against Collins if he persisted in making such errors. Second, Padden, like Collins, was a rank-and-file employee. Finally, there is no evidence to establish that Padden informed Collins of his conversation with Grant prior to Collins' discharge.

additional period of more than 2 weeks. However, several hours after respondent's receipt of the Union's request for bargaining, which was the culmination of Collins' organizing effort on behalf of the Union among respondent's employees, he was summarily and without prior warning discharged, ostensibly because of the mistakes which he had made.

The timing of Collins' abrupt discharge coming as it did hard on the heels of the Union's recognition request and the relatively long period during which respondent suffered Collins' deficiencies as an employee, lead me to believe that the real reason for Collins' dismissal was his activity on behalf of the Union which had its fruition in the Union's request that respondent bargain with it. In this regard, it has been held that the "abruptness of a discharge and its timing are persuasive evidence as to motivation." *N.L.R.B.* v. *Montgomery Ward & Co.*, 242 F. 2d 497, 502 (C.A. 2), cert. denied 355 U.S. 829. It has been further held that "an employer's tolerance of an employee's shortcomings until he engages in union activity is an indication of discriminatory motivation." *Virginia Metalcrafters, Incorporated*, 158 NLRB No. 90, footnote 3.[48]

Finally, my belief that the assigned reason for Collins' dismissal was pretextual is strengthened by the conflicting testimony given by Grant and Thuotte, respectively respondent's secretary and dispatcher, as to the basis for the joint decision to discharge Collins. In *N.L.R.B.* v. *Radcliffe and Mancke*, 211 F. 2d 309, 314 (C.A. 9) cert. denied 348 U.S 833, the court aptly stated that "the giving of * * * inconsistent * * * reasons by management for the discharges of employees, properly, may be considered by the Board * * * in determining the real motive which actuated the dis-

[48] See also *Nitro Super Market, Inc.*, 161 NLRB No. 46.

charges." To the same effect see *International Furniture Company,* 98 NLRB 674, enfd. 199 F. 2d 648 (C.A. 5).

Accordingly, I conclude that by discharging Collins respondent violated Section 8(a)(3) and (1) of the Act.

D. Contentions and concluding findings as to respondent's alleged violations of Section 8(a)(1) and (5) of the act

The complaint asserts that respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union, by causing its employees to abandon a lawful strike, by bargaining directly with its employees, and by causing its employees to repudiate the Union. Inasmuch as the latter allegations have a substantial bearing upon the refusal to bargain averment, they will be discussed first.

The strike and its abandonment

On September 14, following respondent's rejection of the Union's first request for recognition and its discharge of Collins in violation of Section 8(a)(3) of the Act employees who signed cards authorizing their representation by the Union struck. Their purposes in striking, as I have found, was to compel respondent to enter into a collective-bargaining agreement and to obtain Collins' reinstatement. On the next day, September 15, the employees terminated their strike and returned to work.

The complaint alleges that respondent caused its employees to abandon their strike and that by doing so it violated Section 8(a)(1) and (5) of the Act. I do not agree. I cannot find on the record of this case that the termination of the strike was induced by any conduct on the respondent's part. On the contrary, the evidence establishes conclusively that the employees,

of their own volition, decided to abandon the strike and that this decision was not made because of anything done by respondent, but because two servicemen in respondent's employ refused to honor the picket line established by the striking employees at respondent's premises on September 14.

Accordingly, I conclude that the General Counsel has not sustained his burden of proving by a preponderance of the evidence that respondent violated Section 8(a)(1) and (5) of the Act by causing its employees to abandon their strike as alleged in paragraph 15 in the complaint. I will, therefore, recommend that this paragraph and all relating paragraphs of the complaint be dismissed insofar as they have reference to respondent's causing the abandonment of the strike.

Respondent's direct dealing with its employees and their repudiation of the Union

The General Counsel contends that respondent violated Section 8(a)(1) and (5) of the Act in bypassing Union and bargaining directly with its employees following their return to work after their strike and by causing them to repudiate the Union. Although respondent denies this, it argues by way of avoidance that even if it did commit an unfair labor practice by bargaining directly with its employees that violation was remedied by respondent's refusal to meet further with its employees and the immediate notice to this effect which it gave to its employees. Insofar as the repudiation of the Union is concerned respondent asserts that this was not occasioned by its inducement, but, rather, by the employees' disenchantment with the Union.

Briefly, the facts in connection with this phase of the case, as I have found them, are that upon the termination of their short-lived strike respondent and

the employees who had struck engaged in a mutual "gripe" session. Among the complaints aired by the employees was their concern over the absence of a pension plan and a posted pay scale. They also expressed dissatisfaction with some aspects of their sick and holiday pay.

Although the meeting continued for a substantial period of time, neither respondent nor the employees appointed a spokesman for their respective groups, and the conference was, in general, informal. No proposals were presented by either side and no agreements were made as to matters which would normally be found in a collective-bargaining contract. In connection with the employees' complaints over the lack of a pension plan, however, respondent indicated that it had already started negotiations in that regard with several insurance companies.

At the conclusion of the conference respondent agreed to meet again with the employees during the following week. The employees then went into respondent's shop to prepare proposals for submission to respondent before their next meeting.

Immediately after the meeting respondent's president was advised by its lawyer not to meet further with the employees during the pendency of the Union's representation claim. Respondent's president promptly informed its employees that it would follow its lawyer's advice.

I agree with the General Counsel that respondent's discussion with its employees which embraced such matters as sick and holiday pay, pensions, and posted wages scales constituted individual bargaining in derogation of their right to be represented by the Union and, hence, a violation of the Act. I am convinced, however, that a remedial order is not required insofar as this aspect of the case is concerned.

I am persuaded in this regard by respondent's argument that unfair labor practices committed by respondent in dealing directly with its employees were cured by its immediate discontinuance upon being advised to do so by its lawyer and by its prompt notice to the employees that it would not meet further with them. A Board order could not accomplish more.[49]

A different result is required, however, by the sequel to respondent's direct bargaining with its employees', i.e., their repudiation of the Union. Respondent contends that it did not contribute in any way to their employees' withdrawal from the Union. This argument, however, is not well taken, for in the field of labor management relations law no less than in other areas of jurisprudence "a man is held to intend the foreseeable consequences of his conduct," [50] here, the repudiation of the Union by the employees.

Respondent's conduct which resulted in the "foreseeable consequence" of the Union's repudiation started with its meeting with its employees, at the outset of which they stated that they wanted to discuss their "gripes." To this respondent's president replied that perhaps "we could straighten something out by having this get together." As the meeting progressed respondent's representatives indicated that a pension plan, the absence of which appeared to be of greatest concern to the employees, might be in the offing. Although no agreements were actually reached, hope for employee benefits through further conferences was held out by respondent's promise to meet again with its employees the following week.

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[49] As the Supreme Court stated in this regard, "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress." *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348.

[50] *The Radio Officers' Union, etc.* v. *N.L.R.B.*, 347 U.S. 17, 45.

After having thus instilled in its employees the expectation that matters might indeed be straightened out, the employees were informed by respondent that there would be no further meetings because, in the words of its secretary "you have signed cards and you are automatically represented by the Union."

It needs no great imagination to foresee that respondent's entire course of conduct in this regard, including not only the manner in which its individual bargaining with its employees was terminated, but also the violative bargaining itself, and the hope which it engendered for future benefits would result in the employees' rescision of the authority of the Union to act as their bargaining representative. This action was taken by them immediately and formalized in writing some 3 weeks later.

In sum, respondent by bargaining directly with its employees started the chain of events which foreseeably resulted in their repudiation of the Union. Respondent must, therefore, be held responsible for this predictable consequence of its conduct. Accordingly, I conclude that by causing its employees to repudiate the Union respondent violated Section 8(a)(1) of the Act.

Before determining whether, as alleged in the complaint, respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union, preliminary findings must be made concerning the appropriateness of the unit for which the Union sought recognition [51] and as to whether the Union represented a majority of the employees in that unit.[52]

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[51] *Joslin Dry Goods Company*, 118 NLRB 555, 557, 558.

[52] *H. W. Elson Bottling Company*, 155 NLRB 714, 715–716.

The appropriate unit

The complaint, as amended at the trial, asserts that "all employees employed by respondent * * * including fuel truck drivers, installation men, servicemen, soot men, but excluding salesmen, office clerical employees and supervisors" [53] constitute a unit appropriate for collective bargaining.

It is well established that in determining the appropriateness of a unit for collective-bargaining purposes, the prime consideration is the community of interest shared by the employees involved. *E. H. Koester Bakery Co., Inc.,* 136 NLRB 1006, 1009. As further pointed out in *Koester,* the factors "which tend to show the presence or absence of this community of interest" are varied and include such things as the employees' "common experience, duties, wages, hours, and other working conditions." All, *Koester* teaches, must be taken into consideration and evaluated.

I have found that the employees in question are hourly rated. Each has a timecard. All except the maintenance man, wear the same work uniform. All benefit from an insurance program maintained by respondent and enjoy the same vacation and sick leave privileges. All work in respondent's warehouse, except when they are performing duties away from respondent's premises. Finally, insofar as "common experience * * * and working conditions" are concerned, all

[53] Although, as I have found, respondent employs a maintenance man, he is neither specifically included nor excluded in the unit description appearing in the amended complaint. However, in view of the inclusive reference to "all employees," the absence of the term "maintenance man" from the exclusions, and the seeming understanding of the parties that the maintenance man was intended to be included by the General Counsel, the unit description set forth in the amended complaint will be construed as including the maintenance man.

the employees involved share the same restroom and other facilities in the shop.

The main function of the drivers is, as I have found, to deliver fuel oil to respondent's customers. I have also found, however, that for a substantial portion of their time, generally in the summer when there are few deliveries to be made, the drivers assist the servicemen in their work.

Supervision is also a factor to be taken into account in determining whether there is a community of interest among the employees concerned. *L. D. Caulk Company,* 158 NLRB No. 33; *Federal Electric Corporation,* 157 NLRB No. 89. In this regard, there is, as has been found, a considerable amount of common and overlapping direction of the work performed by the employees in question. Thus, respondent's president oversees its "whole operation." Its sales engineer "directs the activities" of the industrial servicemen, and, with assistance from respondent's secretary, assigns work to all servicemen. The drivers, domestic servicemen, and maintenance man are normally supervised by respondent's dispatcher and the sootmen by its secretary, but from time to time respondent's sales engineer also exercises supervision over the sootmen, drivers, and maintenance man. Organizationally, although the dispatcher usually "reports" to respondent's president, he does so, on occasion, to its secretary.

An evaluation of the foregoing factors in my opinion "tends to show the presence * * * of [a] community of interest" among respondent's servicemen, sootmen, drivers, and maintenance man sufficient to warrant their inclusion in a single unit for collective-bargaining purposes.[54] It is respondent's position, however, as set forth in its brief, that to include the serv-

[54] *E. H. Koester Bakery Co., Inc.*, 136 NLRB 1006, 1009.

icemen in a unit which also embraces the other employees in question would be improper because of their special skills, their "lack of interchangeability with other employees" [55] and the coverage of some of them by respondent's contract with the Plumbers Union, which respondent submits "is a bar to these proceedings." For these reasons respondent argues that a unit consisting only of servicemen, excluding those covered by the Plumbers Union contract, "would be more appropriate" than one which also includes other employees.

Considering first, respondent's arguments bottomed upon the contract, it appears that this agreement covers only two of respondent's servicemen. Accordingly, even if this were a representation proceeding,[56] this contract would not operate as a bar, at least insofar as the employees not covered by the contract are concerned. Cf. *N. Sumergrade & Sons,* 121 NLRB 667, 669–670.

Nor does the contract between respondent and the Plumbers Union preclude the placement of the two covered servicemen in a unit which also includes respondent's other employees. The contract is applicable to the two servicemen in question only for a 6-week period in each year during which they install oil burners in buildings under construction. During the rest of the year they do the same kind of work as respondent's other servicemen and are subject to the same working conditions as all other persons in respondent's employ. They are, therefore, dual-func-

[55] This contention appears to be effectively negatived by the assistance afforded the serviceman by the drivers, as pointed out above.

[56] See *Hexton Furniture Company*, 111 NLRB 342, 343–344, which applied contract bar principles to a complaint case alleging violations of Section 8(a)(5) of the Act.

tion employees. As such, regardless of the contract, they may be placed in the same unit with other employees whose interests they share. *Berea Publishing Company,* 140 NLRB 516, 519. In *Denver-Colorado Springs-Pueblo Motor Way,* 129 NLRB 1184, overruled in other respects by *Berea Publishing,* the employee in question was, as are the two servicemen here, covered by a contract with another union. Although the Board noted this factor, it was given no weight in determining the unit placement of the dual-function employee there under consideration.

While I agree with respondent that the servicemen exercise special skills, I do not agree that they should for this reason be set apart for unit purposes from the other employees with whom they share common working conditions and other interests. Cf. *Meramec Mining Company,* 134 NLRB 1675, 1676, in which the Board stated that the unit placement of certain highly skilled technical employees would be determined upon "an analysis of their community of interest," taking into consideration not only their "skills and duties," but also the other usual factors such as "the presence and absence of common supervision, the similarity or disparity of working conditions, the kind of industry, the contact or interchange with other employees, and the organization of the plant."

Respondent's final argument, insofar as this phase of the case is concerned, is that a unit consisting only of servicemen, excluding those covered by its contract with the Plumbers Union "would be more appropriate" than one which also includes other employees. A short, but effective, answer to this is found in *Morand Brothers Beverage Co.,* 91 NLRB 409, 418. There the Board aptly stated that the Act does not require "that the unit for bargaining be the *only* appropriate unit,

or the *ultimate* unit, or the *most* appropriate units; the Act requires only that the unit be 'appropriate'." [57]

Respondent's arguments as to why the servicemen should not be included in a unit for collective bargaining which also includes respondent's other employees being, in my opinion, without merit. I conclude, in view of the sufficiency of their community of interest that respondent's drivers, servicemen, sootmen, and maintenance man constitute an appropriate collective-bargaining unit.

The Union's majority

Having concluded that a unit consisting of respondent's drivers, servicemen, sootmen, and maintenance man is appropriate for collective bargaining, it must next be ascertained whether the Union represented a majority of the employees in this unit. In this regard, it is respondent's contention that the authorization cards on which the union majority claim is based are invalid because of misrepresentation in their procurement.

There were 15 employees in this unit on September 9 and 14, on both of which dates the Union requested recognition. To establish the Union's majority the General Counsel offered 10 cards in evidence. Nine were signed before September and the 10th was signed on September 13.

Although contending that each card was obtained by misrepresentations sufficient to invalidate it, respondent refers specifically to four, those signed by

[57] Although *Morand Brothers* has had a checkered history on enforcement and on remand, the principle enunciated in the text does not appear to have been questioned. See *Morand Brothers Beverage Co.*, v. *N.L.R.B.*, 190 F. 2d 576 (C.A. 7), enfg. in part and remanding 91 NLRB 409, and 204 F. 2d 529, enfg. 99 NLRB 1448, cert. denied 346 U.S. 909; rehearing denied 346 U.S. 940.

Carlson, Rouleau, Emery, and MacLellan, as being illustrative of all,[58] and urges that these four, at least, be not counted in determining the Union's majority. If this were done, it would, of course, result in the Union's representation of only six employees in the unit, less than a majority.

The cards unequivocally authorized the Union to "represent" those who signed "for the purposes of collective bargaining." No other stated purpose appeared on the cards. "An authenticated signature on an authorization card [like those signed by the employees here] is *prima facie* evidence that it is what it purports to be—a designation of the Union as the employee's bargaining representative, unless it is shown that the employee was induced to sign the card through beguilement or serious misstatement of fact." [59] This is so, "irrespective of what the employee thought * * * as long as the solicitor does not make a significant false statement * * *" *South Bay Daily Breeze*. 160 NLRB No. 145.

Considering the disputed cards in the light of these principles, I find, insofar as Carlson is concerned, that he was truthfully and in accordance with the text of the card told by Collins, who solicited cards on behalf of the Union, in response to an inquiry, that he would not become a member of the Union by signing the card and that the cards would authorize the Union to "talk to the company on [his] behalf." Collins told Rouleau substantially the same thing and added a suggestion that Rouleau attend a union meet-

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[58] See footnote 22 for my conclusion with respect to this.

[59] To undercut the validity of an authorization card "which [as in this case] plainly designates a union as bargaining agent, the employer can prevail only with clear evidence of misrepresentation." *Amalgamated Clothing Workers of America, AFL-CIO v. N.L.R.B.*, ——— F. 2d ——, 63 LRRM 2581, 2584 (C.A.D.C.).

ing. No statements as to the card's purport were made to MacLellan. He was merely asked by Galullo, the Union's business representative, to sign the card, and he did so.

The impressions harbored by Carlson and MacLellan as to the significance of the cards were their own and were not engendered by any statement made by Collins, Galullo, or any other representative of the Union. Thus, Carlson testified that it was his "own conclusion" that the purpose of the card was to indicate the signer's interest in "forming a union"; that the Union would so notify respondent; and that then the employees could decide "whether or not [they] wanted to vote the union in." MacLellan formed a completely different impression as to the meaning of the cards based upon, as he testified, "general conversation" among the employees.[60] He concluded that employees had to sign cards as a prerequisite to their talking to "the Union."

As *South Bay Daily Breeze* directs, however, I may not rely on these thoughts as to the meaning of the cards in determining their validity. I may only consider whether there is clear evidence that the employees were "induced to sign * * * through beguilement or serious misstatement of fact." Finding neither present I conclude that there was no impropriety in the Union's procurement of authorization cards from Carlson, Rouleau, and MacLellan. They will, therefore, be counted in determining whether the Union represented a majority of the employees in the unit.

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[60] Although Collins was present when this "general conversation" took place, MacLellan admitted that Collins did not say anything which contributed to the establishment of his impression.

A different conclusion is required with respect to Emery's card. By September 7, the day on which Emery signed his card, only six other employees in the unit had done so.[61] Notwithstanding this, Collins told Emery on that day that all the other employees had signed cards and that he was the only one who had not. This misrepresentation was serious enough to invalidate Emery's card. *Pizza Products Corporation,* 153 NLRB 1265, 1266, 1271, enfd. as modified in other respects, 369 F. 2d 431 (C.A. 6). It will, therefore, not be considered in ascertaining the Union's majority status.

Adding the cards signed by Carlson, Rouleau, and MacLellan to the six other cards signed by employees in the unit,[62] all of which I find to be valid, the Union represented eight employees in the unit on September 9, the date of its first request for bargaining and nine on September 14, the date on which it again requested recognition. Inasmuch as there were a total of 15 employees in the unit on those dates, I conclude that the Union represented a majority on both occasions.

Respondent's refusal to bargain with the Union

In justification of its refusal to bargain with the Union respondent makes two basic arguments. The first is that the unit for which the Union sought recognition is inappropriate. The second is that in good faith it doubted, at the time of the bargaining requests, that the Union represented a majority. Accordingly, respondent argues in its brief, it had sufficient reason "to refuse recognition and to demand that the Board processes be followed to, first, determine

[61] I am including Padden's card in this figure, although it, too, was signed on September 7.

[62] These consist of cards signed by Collins, Robert Chiaro, Thomas Yale, Padden, John Yale, and Parisi.

what the appropriate unit was, and, second, by the use of the Board's election procedures to determine whether or not the employees in such an appropriate unit desired to be represented by the Union." Countering the General Counsel's contention that respondent's refusal to recognize and bargain with the Union was not based upon its foregoing claims but upon its determination to gain time within which to destroy the Union's majority status, respondent also asserts in its brief "that absolutely no independent 8(a)(1) violations have been proved by substantial evidence" and that there "was no flagrant violation of the Act."

Respondent's argument concerning the appropriateness of the unit is without merit. It is well settled that an employer acts "at its peril" in refusing to bargain on the ground that the unit in which the Union seeks recognition is inappropriate if it is concluded, as in this case, that the unit is appropriate. *Tom Thumb Stores, Inc.*, 123 NLRB 833, 835. See also *Hoskins Ready-Mix Concrete, Inc.*, 161 NLRB No. 132.

Respondent's other arguments in defense of its refusal to bargain with the Union are likewise without merit. Where an employer, in good faith genuinely doubts that a union seeking recognition represents a majority of the employees involved he may refuse to recognize the union until its claim is established by an election. An employer, however, is not entitled to an election where he engages in serious unfair labor practices in order "to gain time within which to undermine the Union's support" and then asserts a good-faith doubt as to the union's majority. In such a case the election procedure will be bypassed and the employer will be required to bargain with the union provided the unit involved is appropriate and the union in fact represented a majority of the employees when it requested recognition. This is the teaching of *Joy Silk*

Mills, Inc., 85 NLRB 1263, enfd. as modified in other respects 185 F.2d 732 (C.A.D.C.), cert. denied 341 U.S. 914, and of countless subsequent cases.

The facts of this case, I am convinced, require the application of the *Joy Silk* rationale. Respondent's serious unfair labor practices, including the discharge of Collins in violation of Section 8(a)(3) and (1), its direct bargaining with its employees, and its having caused them to repudiate the Union, in violation of Section 8(a)(1) of the Act, belie respondent's professed good-faith doubt as to the Union's majority.[63] I, therefore, reject respondent's contentions in this regard, and find, in view of respondent's serious violations of Section 8(a)(1) and (3) of the Act, that its refusal to bargain with the Union was in bad faith, and was designed to gain time in which to destroy the Union's status as its employees' collective-bargaining representative.

Accordingly, having found that the unit for which the Union requested recognition was appropriate for purposes of collective bargaining and that the Union represented a majority of the employees in that unit when it requested respondent to bargain with it, I conclude that respondent's rejection of those requests and its refusal to bargain with the Union constituted violations of Section 8(a)(5) and (1) of the Act.

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[63] Even if Collins' violative discharge had been respondent's only unfair labor practice, my conclusion with respect to this phase of the case would not be different. See *Dee's of New Jersey, Inc.*, 161 NLRB No. 18, where the Board stated in a related context that "a discriminatory denial of employment [is] the kind of conduct which is most likely to impress upon employees the disfavor with which the employer regards his employees' organizing activities" and that, therefore, "a serious view must be taken" of such a violation.

IV. The effect of the unfair labor practices upon commerce

Respondent's activities set forth in section III, above, occurring in connection with its operations set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that respondent engaged in the unfair labor practices set forth above, my Recommended Order will direct respondent to cease and desist therefrom and to take such affirmative action as will effectuate the purposes of the Act.[64] In this connection, as respondent has already offered reinstatement to Collins, respondent will be required only to make him whole for loss of earnings he may have suffered by the discrimination practiced against him. Any back pay found to be due to Collins shall be computed in accordance with the formula set forth in *F. W. Woolworth Company,* 90 NLRB 289, and shall include interest in the amount and manner provided for in *Isis Plumbing & Heating Co.,* 138 NLRB 716.

Contending that the strike which took place on September 14, was an unfair labor practice strike, the General Counsel urges that the order to be entered herein provide that the strikers "be made whole for the consequences of Respondent's actions." While I agree that the work stoppage in qestion was an unfair labor practice strike,[65] there is no evidence that the

[64] Having concluded that respondent has already cured the unfair labor practices involved in its direct bargaining with its employees, I will not recommend the entry of an order remedying this violation. See page 15, *supra*, for my reasons.

[65] Mitchell Concrete Products Co., Inc., 137 NLRB 504, 506.

strikers were refused reinstatement when they decided to return to work. Absent this, as is well settled, a "make whole" remedy, insofar as they are concerned, is unwarranted.

In view of the repudiation of the Union by respondent's employees, respondent urges that the entry of a bargaining order would completely disregard the right of those employees, as set forth in Section 7 of the Act, to refrain from collective bargaining. Respondent, however, as I have found, is responsible for its employees' defection from the Union. Were respondent to be permitted to continue its refusal to bargain with the Union because it does not now represent a majority of its employees would be to permit respondent to profit from its own wrong. As the Supreme Court stated in *Medo Photo Supply Corporation* v. *N.L.R.B.*, 321 U.S. 678, 687, which involved a situation substantially similar to the one presented here:

> Petitioner cannot, as justification for its refusal to bargain with the Union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will.

See also, to the same effect, *Franks Bros. Company* E. N.L.R.B., 321 U.S. 702, 703–705.

Accordingly, my Recommended Order will contain a provision requiring respondent to bargain with the Union. It will also contain, in view of the nature and extent of the unfair labor practices engaged in by respondent, broad cease-and-desist provisions.

Upon the basis of the foregoing findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By bargaining directly with its employees and by causing them to repudiate the Union and to rescind the authority of the Union to represent them for purposes of collective bargaining, as set forth in section III hereof, respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

4. By discharging Carl Collins because of his membership in, and activities on behalf of, the Union, thereby discouraging such conduct, respondent has engade in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. All employees employed by respondent, including fuel truck drivers, installation men, servicemen, power cleaners, also known as sootmen, and maintenance men, excluding salesmen, office clerical employees and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. At all times material herein the Union has represented a majority of the employees in the unit set forth in Conclusion of Law 5, above.

7. By failing and refusing to recognize and bargain with the Union as the collective-bargaining representative of the employees in the unit set forth in Conclusion of Law 5, above, respondent has engaged in

and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

8. Respondent did not engage in unfair labor practices in the manner set forth in those portions of paragraph 15 and related paragraphs of the complaint insofar as those paragraphs make reference to respondent's having caused its employees to abandon a lawful strike.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record in this case, I hereby issue the following:

RECOMMENDED ORDER

The Pembek Oil Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or inducing employees to repudiate International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other labor organization.

(b) Causing or inducing employees to rescind the authority of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other labor organization, to represent them for purposes of collective bargaining.

(c) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other labor organization, by discriminating against employees in regard to hire or tenure of employment or any term or condition of employment.

(d) Failing or refusing to recognize or bargain collectively concerning rates of pay, wages, hours, or other terms or conditions of employment with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No.

677, as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All employees employed by respondent, including fuel truck drivers, installation men, servicemen, power cleaners, also known as sootmen, and maintenance men, excluding salesmen, office clerical employees and supervisors as defined in the Act.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act, as amended, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment in conformity with Section 8(a)(3) of the Act.

2. Take the following affirmative action which, it is found, will effectuate the policies of the National Labor Relations Act, as amended:

(a) Make Carl Collins whole for any loss of earnings he may have suffered by reason of the discrimination practiced against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the National Labor Relations Board or its agents, for examination or copying, all payroll records, social security payment records, timecards, personnel records or reports, and all other records necessary or useful to detemine the amount of backpay due under the terms of this Recommended Order.

(c) Upon request, recognize and bargain with International Brotherhood of Teamsters, Chauffeurs, Ware-

housemen and Helpers of America, Local Union No. 677, as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, or other terms or conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Post, at its premises copies of the attached notice marked "Appendix A."[66] Copies of said notice, to be furnished by the Regional Director for Region 1 of the National Labor Relations Board, after being signed by an authorized representative of respondent, shall be posted by respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify said Regional Director, in writing, within 20 days from receipt of this Decision, what steps respondent has taken to comply herewith.[67]

It is further order, That the complaint be, and it hereby is, dismissed insofar as it alleges unfair labor practices not specifically found herein.

Dated at Washington, D.C.

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[66] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[67] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

Appendix A

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

After a trial in which both sides had the opportunity to present their evidence it has been found that we violated the law by committing unfair labor practices and we have been ordered to post this notice and to keep the promises that we make in this notice.

We will not cause, induce, request, or encourage you to repudiate, withdraw, or resign, from International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other union.

We will not cause, induce, request, or encourage you to cancel, or seek the return of, any card you may have signed naming, authorizing, or designating International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, local Union No. 677, or any other union, to act as your collective-bargaining representative.

We will not discourage union activity or membership in International Brotherhood of Teamsters, Chauffeurs, Warehouse and Helpers of America, Local Union No. 677, or any other union, by discriminating against you if you choose to engage in union activity, or if you join International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other union.

We will not in any other way interfere with, restrain, or coerce you in the exercise of any rights guaranteed to you by the National Labor Relations Act. In this connection, we will respect your rights to self-organization, to form, join, or assist any union, to bargain collectively through any union or representative of your choice as to wages, hours of work, and any other term or condition of employment. You also have the right, which we also will respect, to refrain from doing so.

We will not discriminate against any employees for engaging in union activity or for joining any union. Since it has been found that we did so when we fired Carl Collins, to whom we have already offered full reinstatement to his old job, we will pay him for any loss he suffered because we fired him.

Appendix B

Case 1–CA–5652

THE PEMBEK OIL CORPORATION
and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 677

It is ordered, That the stenographic transcript of this proceeding be, and the same hereby is, corrected as indicated below:

Page	*Line*	*From*	*To*
5	2	Procedures	Procedure
19	20	concludes	constitutes
36	1	months	men
129	24	the man	the first man
149	23	overruled	overrule
150	25	foundation	date
196	9	would	will
196	21–22	allies the discharge to an unfair labor practice charge	as well as the discharge as an unfair labor practice
197	7	admit for	admit it was for
207	14	I	he
238	15	main	mail
245	2	is entirely	is not entirely
264	22	as	ask
267	9	in areas	in these areas
274	20	fact	fast
340	4	say necessarily	say is necessary
344	3–4	evidence that maybe any	evidence—maybe my
398	3	will have	will not have
400	20	made up of this employment	were made up of these employees
426	16	wl	21
451	11	my doing	my not doing
452	11	work	word

Dated: Washington, D.C.

U.S. GOVERNMENT PRINTING OFFICE: 1969